١٦

﴿ ترجمة ﴾

الخط الشريف السلطاني

﴿ و ﴾

القانون الاساسي

﴿ طبع في مطبعة الجوائب بالاستانة العلية ﴾

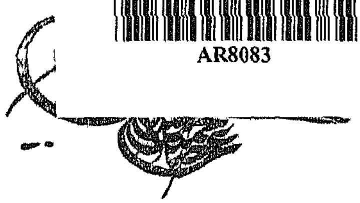
﴿ بامر الباب العالي ﴾

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بسم الله الرحمن الرحيم

﴿ ترجمة ﴾

الخط الشريف السلطاني



﴿ وزيرى سمير المعالى مدحت باشا ﴾

ان التدنيات العارضة منذ ازمان على قوة دولتنا العلية قد نشأت من الانحراف عن الطريق المستقيم فى ادارة الامور الداخلية اكثرمما نشأ من العوائل الخارجية ومن ميل الاسباب الكافله امنيه التبعة من حكومتهم المتنوعة الى الانحطاط فلذا كان والدى الماجد المرحوم عبد المجيد خان اعلن مقدمه للاصلاحات خط التنظيمات الذى منح فيه للعموم الامن على نفوسهم واموالهم واعراضهم وناموسهم كما يوافق احكام الشرع الشريف المقدسة فاعشناه للآن ضمن دائرة الامن وما وفقنا به اليوم

بوضع واعلان هذا القانون الاساسى الذى هو ثمرة الارآء والافكار المتداولة بالحرية المستندة على تلك الامنية ما هو الا من جملة آثار تلك التنظيمات الخيرية فلذلك اردد خاصة فى هذا اليوم المسعود اسم المرحوم المشار اليه وموفقيته واصفه بعنوان محيى الدولة ولا ريب بانه لو كان الاوان الذى تأسست فيه التنظيمات المذكورة موافقا لاستعداد زماننا هذا واحتياجاته لكان المرحوم المشار اليه اسس اذ ذاك احكام هذا القانون الاساسي الذى نشرناه الآن واجراءه ولكن جناب الحق علق حصول هذه النتيجة المسعودة الكافلة بالتمام سعادة حال ملتنا وعوقها لعهد سلطنتنا فنقدم بناء على هذه الدلالة لجناب الرب الكريم الحمد والشكر العظيم على ان التغييرات التى وقعت بالطبع فى احوال داخلية دولتنا العلية والتوسعات التى حصلت فى مناسباتها الخارجية اوصلت عدم كفاءته شكل ادارة الحكومة لدرجة البداهة ولما كان اقصى مقاصدنا الخيرية ازالة الاسباب المانعة للان الاستفادة الواجبة من ثروة مملكتنا وملتنا الطبيعية ومن قابليتهما الفطرية وتقدم صنوف التبعة فى طرق الترقى بالتعاون والاتحاد اقتضى لاجل الوصول الى هذا المقصد ان نتخذ للحكومة قاعدة سالمة ومنتظمة وهذا ايضا يتوقف على تأمين هذه الفوائد وتقريرها بمعنى ان قوة الحكومة تحافظ على حقوقها المقبولة والمشروعة وعلى منع الحركات غير المشروعة اعنى بها منع ومحو الخطيئات وسوء الاستعمالات المتولدة من الحكم الاستبدادى الفردى او الافراد القلائل لتستفيد الاقوام المركبة هيئتنا باجمعهم بلا استثناء من نعمة الحرية والعدالة والمساواة ذلك حق ومنفعة جريان بالهيئة الاجتماعية المدنية ولما كان ربط القوانين والمصالح العمومية بقاعدتى المشورة والمشروطية المشروعتين والثابت خيرهما مما تحتاج اليه هذه الاصول اودعنا فى خطنا الذى اذعنا به جلوسنا عن لزوم ترتيب مجلس عمومى وبما ان القانون الاساسى الذى اقتضى تنظيمه فى هذا المطلب قد ترتب بالمذاكرة فى الجمعية

المخصوصة التي تعينت مركبة من متحيزي الوزراء وصدور العلماء
ومن سائر رجال ومأموري دولتنا العليا وجرى عليه التصديق في مجلس
وكلائنا بعد امعان نظر التدقيق وكانت المواد المندرجة فيه انما هي
متعلقة بحقوق الخلافة الاسلامية الكبرى والسلطنة العثمانية العظمى
وحرية العثمانيين ومساواتهم وصلاحية الوكلاء والمأمورين ومسئوليتهم
وبما للمجلس العمومي من حق الوقوف وباستقلال المحاكم الكامل وبصحة
الموازنة المالية وبالمحافظة على مركز الحقوق في ادارة الولايات واتخاذ
اصول توسيع المأذونية وكان جميع ما ذكر مطابقا لاحكام الشرع
الشريف ولاحتياج الملك والملة وقابليتهما في يومنا هذا وكانت اخص
امالنا في مطلب سعادة العامة وترقياتها مساعدة لهذا الفكر الخيري
وموافقة له فاستنادا على عون الله وامداد روحانية جناب رسول الله
قد قبلنا هذا القانون الاساسي وارسلنا به لطرفكم بعد ان صادقنا عليه
فبادروا لاعلانه في جميع انحاء الممالك العثمانية واطرافها ليكون
دستورا للعمل الى ما شاء الله وباشروا باجراء احكامه منذ اليوم
متخذين اسرع التدابير لتنظيم ما تقرر فيه وتسطر من النظامات والقوانين
كما هو مطلوبنا القطعي ونسأل جناب الحق المتعال ان يجعل مساعي
المجتهدين في سعادة حال ملكنا وملتنا مظهرا للتوفيق في كل الاعمال

في ٧ ذي الحجه سنه ١٢٩٣

القانون الاساسى

﴿ فى ممالك الدولة العثمانية ﴾

﴿ المادة الاولى ﴾ ان الدولة العثمانية تحتوى على الممالك والقطع الحاضرة وعلى الايالات الممتازة وجميعها جسم واحد لا يمكن تفريقه او تجزيه بوقت من الاوقات او بسبب من الاسباب

﴿ المادة الثانية ﴾ ان مدينة استانبول هى عاصمة الدولة العثمانية ومقرها وهذه المدينة غير معفاة او ممتازة عما سواها من جميع البلاد العثمانية

﴿ المادة الثالثة ﴾ ان السلطنة السنية العثمانية الحائزة على الخلافة الكبرى الاسلامية تكون لاكبر اولاد سلالة آل عثمان بحسب الاصول القديمة

﴿ المادة الرابعة ﴾ ان حضرة السلطان حسب الخلافة هو الحامى لدين الاسلام وهو ملك جميع التبعة العثمانية وسلطانها

﴿ المادة الخامسة ﴾ ان نفس ذات الحضرة السلطانية هى مقدسة وغير مسئولة

﴿ المادة السادسة ﴾ ان حقوق حرية سلالة آل عثمان واموالهم واملاكهم الذاتية وتخصيصاتهم المالية ما دام الحيوة جميعها تحت التكافل العمومى

﴿ المادة السابعة ﴾ ان عزل الوكلاء ونصبهم وتوجيه المناصب والرتب واعطاء النياشين وتوجيهات الايالات الممتازة توفيقا لشروط امتيازهم وضرب المسكوكات وذكر اسمه فى الخطب وعقد المعاهدات

ع الدول الاجنبية واعلان الحرب والصلح والترأس على القوة البحرية والبرية واجراء الحركات العسكرية والاحكام الشرعية والقانونية وتنظيم النظامات المتعلقة بمعاملات دوائر الادارة وتخفيف المجازاة القانونية اوالعفو عنها وعقد المجالس العمومي اوفضه وتعطيله وفسخ هيئة المبعوثان لدى الاقتضاء على شرط انتخاب الاعضاء مجددا ذلك جميعه من جملة حقوق الحضرة السلطانية المقدسة

﴿ فى حقوق تبعة الدولة العثمانية العمومية ﴾

﴿ المادة الثامنة ﴾ يطلق اسم عثمانى بدون استثنا على كافة افراد التبعة العثمانية من اى دين ومذهب كانوا وهذه الصفة العثمانية تضاع اوتستحصل على مقتضى الاحوال المعينة قانونيا

﴿ المادة التاسعة ﴾ العثمانيون باجمعهم يملكون حريتهم الشخصية ومكلفون بان لا يتسلطوا على حقوق حرية الاخرين

﴿ المادة العاشرة ﴾ تصان الحرية الشخصية من كافة انواع التعرض ولا يجازى احد تحت اى حجة كانت خارجا عن الصور والاسباب المعينة فى القانون

﴿ المادة الحادية عشرة ﴾ ان دين الدولة العثمانية هو دين الاسلام فمع المحافظة على هذا الاساس تكون حرية جميع الاديان المعروفة فى الممالك العثمانية وكافة الامتيازات الممنوحة الى الجماعات المختلفة تحت حماية الدولة على شرط ان لا تخل براحة الخلق ولا بالآداب العمومية

﴿ المادة الثانية عشرة ﴾ تكون المطبوعات مطلقة فى دائرة القانون

﴿ المادة الثالثة عشرة ﴾ التبعة العثمانية ماذونة ان تشكل ضمن

دائرة

دائرة النظام والقانون كل انواع الشركات لاجل التجارة والصنعة والفلاحة

﴿ المادة الرابعة عشرة ﴾ اذا راى احد التبعة العثمانية او عدة اشخاص منهم قضية متعلقة بهم او بالعموم مخالفة للقوانين والنظامات يحق لهم ان يقدموا بخصوصها عرض حال لمرجعها ويحق لهم كذلك ان يقدموا للمجلس العمومى عرض حال ممضى منهم بصفة مدعين وان يشتكوا من افعال المأمورين

﴿ المادة الخامسة عشرة ﴾ امر التدريس يكون مطلقا وكل عثمانى مأذون بالتدريس خصوصيا كان او عموميا على شرط اتباع القانون المعين

﴿ المادة السادسة عشرة ﴾ توضع جميع المكاتب تحت نظارة الدولة ويجب التشبث فى الاسباب التى تجعل التربية العثمانية على نسق واحد فى الاتحاد والانتظام ولا يقع خلل فى اصول التعليم المتعلق بامور معتقدات الملل المختلفة

﴿ المادة السابعة عشرة ﴾ يكون كافة العثمانيين متساوين فى حقوق المملكة ووظائفها امام القانون فيما عدا الاحوال المذهبية والدينية

﴿ المادة الثامنة عشرة ﴾ يشترط فى مطلب استخدام التبعة العثمانية فى خدمات الدولة ان يعرفوا اللسان التركى الذى هو لسان الدولة الرسمى

﴿ المادة التاسعة عشرة ﴾ تقبل عموم التبعة فى ماموريات الدولة ويستخدمون فيما يناسب منها بحسب اهليتهم ولياقتهم

﴿ المادة العشرون ﴾ تطرح التكاليف المقررة وتتوزع على التبعة بنسبة اقتدار كل فرد منهم توفيقا لنظاماتها المخصوصة

﴿ المادة الحادية والعشرون ﴾ يكون كل فرد امنا على ماله وعلى ملكه المتصرف فيه تصرفا اصوليا ولا يؤخذ من احد الملك الذي في تصرفه ما لم يثبت لزومه للمنافع العمومية وما لم يدفع له ما يساويه من الثمن نقدا على موجب القانون

﴿ المادة الثانية والعشرون ﴾ يصان مسكن كل فرد في الممالك العثمانية ومنزله من التعرض وليس في وسع الحكومة ان تدخل جبرا الى مسكن احد او منزله بسبب من الاسباب فيما عدا الاحوال التي يعينها القانون

﴿ المادة الثالثة والعشرون ﴾ على موجب حكم قانون اصول المحاكمة المقرر وضعه لا يجبر احد البتة على الذهاب الى محكمة غير المحكمة المنسوب اليها قانونيا

﴿ المادة الرابعة والعشرون ﴾ السخرة والمصادرة والجريمة ممنوعات ويستثنى من ذلك التكاليف والاحوال التي تعين اصوليا في اثناء المحاربة

﴿ المادة الخامسة والعشرون ﴾ لا يوخذ من احد بارة الفرد تحت اسم ويركو ورسومات او تحت اى اسم اخر من غير ان يكون ذلك مستندا على قانون

﴿ المادة السادسة والعشرون ﴾ التعذيب وكل انواع الاذية ممنوعين بالكلية بالوجه القطعي

﴿ في وكلاء الدولة ﴾

﴿ المادة السابعة والعشرون ﴾ يحال مسند الصدارة والمشيخة الاسلامية

الاسلامية الى من تأتمنهم الحضرة السلطانية وتجرى كذلك مامورية كافة الوكلاء بموجب الارادة السنية

﴿ المادة الثامنة والعشرون ﴾ يعقد مجلس الوكلاء تحت رئاسة الصدر الاعظم وهذا المجلس هو مرجع الامور الداخلية والخارجية وما يحتاج من قرار مذاكرته للاستئذان يجري بالارادة السلطانية

﴿ المادة التاسعة والعشرون ﴾ كل من الوكلاء يجرى على وفق الاصول كل ما يكون داخلا تحت ماذونيته من الامور العائدة لدائرته وما كان خارجا عنها يعرض على الصدر الاعظم فيجرى الصدر مقتضى ما يكون منها غير محتاج للمذاكرة او يستاذن عنه من الحضرة السلطانية والذى يحتاج الى المذاكرة يعرضه على مذاكرة مجلس الوكلاء ويجرى مقتضاه على موجب الارادة السنية اما انواع هذه المصالح ودرجاتها فتتعين بنظام مخصوص

﴿ المادة الثلاثون ﴾ وكلاء الدولة مسئولون عن الاحوال والاجراآت المتعلقة بماموریاتهم

﴿ المادة الحادية والثلاثون ﴾ اذا اورد احد اعضاء المبعوثان او عدة منهم شكاية على احد الوكلاء توجب عليه المسئولية من قبيل بعض الاحوال الداخلة ضمن دائرة وظيفة هيئة المبعوثان يرسل رئيس الهيئة تقرير الشكاية المتقدم له فى ظرف ثلاثة ايام الى الشعبة المامورة بالتدقيق على ما يماثل هذه المواد لتنظر فى ان كان نظام هيئة المبعوثان الداخلى يوجب تحويلها الى الهيئة اولا وبعد ان تجرى الشعبة التحقيقات اللازمة وتستحصل من المشتكى عليه الايضاحات الكافلة يتلى لدى هيئة المبعوثان قرارها الذى يترتب باكثرية الآراء بلزوم التذكر على الشكاية واذا مست الحاجة تستدعى الهيئة كذلك الذات المشتكى عليه وتسمع منه رأسا او من وكيله الايضاحات التى يوردها فى هذا الباب ومتى قر

القرار بالاكثرية المطلقة من ثلثي الاعضاء الموجودين على قبول الشكاية تقدم مضبطة طلب المحاكمة الى مقام الصدارة فيقدمها الصدر للعرض وتحال الكيفية الى الديوان العالي بعد تعلق الارادة السنية عليها

﴿ المادة الثانية والثلاثون ﴾ ان اصول محاكمة المتهمين من الوكلاء ستعين بنظام مخصوص

﴿ المادة الثالثة والثلاثون ﴾ لافرق بين الوكلاء وسائر افراد العثمانيين في كل انواع الدعاوى المتعلقة بانفسهم خاصة خارجا عن مأمور يتهم اما محاكمة ماشاكل هذه الدعاوى والخصوصات فتجرى في المحاكم العمومية المنوط بها رؤيتها

﴿ المادة الرابعة والثلاثون ﴾ يسقط من الوكالة كل الوكلاء الذين يقرر قرار دائرة الاتهام في الديوان العالي على كونهم متهمين وذلك الى ان تتبرأ ذمتهم

﴿ المادة الخامسة والثلاثون ﴾ اذا اصر الوكلاء على قبول احد المواد المختلف عليها بينهم وبين هيئة المبعوثان وكرر المبعوثان رفضها قطعيا باكثرية الاراء المشفوعة بتفصيل الاسباب الموجبة لرفضها فيكون حينئذ بيد اقتدار الحضرة السلطانية تبديل الوكلاء او فسخ هيئة المبعوثان على شرط تجديد انتخابها في المدة القانونية

﴿ المادة السادسة والثلاثون ﴾ اذا ظهر في بعض ازمنة انعقاد المجلس العمومي واجتماعه ضرورة مبرمة لوقاية الدولة من خطر او الامن العام من خلل في وقت غير مساعد على جلب المجلس المذكور وجمعه لاجل التذاكر في القانون الذي يرى لزوما لوضعه في تلك النازلة فما تعطيه الوكلاء حينئذ من القرارات التي لا تغاير احكام القانون الاساسي تعتبر موقتا بموجب الارادة السنية في قوة حكم القانون .

القانون وذلك الى ان تجتمع هيئة المبعوثان وتعطى قرارا بخصوصها

﴿ المادة السابعة والثلاثون ﴾ كل من الوكلاء يستطيع متى اراد ان يحضر فى الهيئتين او ان يوجد بهما بالوكالة عنه احد روساء ماموري معينة وله حق التقدم على الاعضاء فى ايراد النطق

﴿ المادة الثامنة والثلاثون ﴾ اذ قر قرار هيئة المبعوثان بالاكثرية ان يستدعى لحضوره احد الوكلاء للاستيضاح عن مادة ففى وسع الوزير المدعى ان يذهب الى الهيئة بالذات او يرسل احد روساء ماموري معينة ليجاوب عما يسأل عنه وفى وسعه ايضا ان يؤخر الجواب اذا وجد لزوما على شرط ان تكون مسئولية التأخير عل

﴿ فى المامورين ﴾

﴿ المادة التاسعة والثلاثون ﴾ جميع المامورين ينتخبون للماموريات التى يكونون اهلا لها على وفق الشروط التى ستعين نظامها والمامورين المنتخبين على هذا الوجه لا يعزلوا او يبدلوا ما لم يتحقق قانونيا الحال الموجب عزلهم او ما لم يستعفوا من تلقاء انفسهم او ما لم ير لدى الدولة سبب ضرورى لعزلهم اما من كان منهم مستقيما وحسن السلوك وانفصل عن مأموريته لسبب مقتضى لدى الدولة فله حق بالترقى او بالتقاعد او بمعاش معزوليته حسبما يتعين فى نظام هذا المطلب المخصوص

﴿ المادة الاربعون ﴾ سيتعين نظام مخصوص لوظائف كل مأموريه على حدتها وكل مأمور مسئول ضمن دائرة وظيفته

﴿ المادة الحادية والاربعون ﴾ كل مأمور ملزوم باحترام آمره واطاعته ضمن الدائرة التى يعينها القانون اما اطاعته للآمر فى الامور

المخالفة للقانون لا تكون مدارا لتخليصه من المسئولية

﴿ فى المجلس العمومى ﴾

﴿ المادة الثانية والاربعون ﴾ المجلس العمومى يحتوى على هيئتين احداهما تدعى هيئة الاعيان والثانية هيئة المبعوثان

﴿ المادة الثالثة والاربعون ﴾ اجتماع هيئتى المجلس العمومى فى كل سنة يكون فى بداية تشرين الثانى والمجلس المذكور يفتح او يغلق بموجب الارادة السنية وغلقه يكون فى بداية مارت ولا تعقد احدى هاتين الهيئتين فى زمان تكون به الاخرى غير مجتمعة

﴿ المادة الرابعة والاربعون ﴾ للحضرة السلطانية ان تفتح المجلس العمومى قبل وقته اذا وجد لدى الدولة لزوم لذلك وان تنقص مدة الاجتماع المعينة او تزيدها وتمدها

﴿ المادة الخامسة والاربعون ﴾ يتم افتتاح المجلس العمومى بحضور الحضرة السلطانية بالذات او بالوكالة بحضور الصدر الاعظم ووكلاء الدولة واعضاء الهيئتين معا ويتلى فى ذلك اليوم نطق سلطانى متعلق باحوال داخلية الدولة ومناسباتها الخارجية فى ظرف السنة الجارية وفيما يجب اتخاذه من التشبثات والتدابير فى السنة الاتية

﴿ المادة السادسة والاربعون ﴾ فى يوم افتتاح المجلس يحلف بحضور الصدر الاعظم كل من الذوات المنتخبين او المنصوبين اعضاء للمجلس العمومى بان يكون صادقا للحضرة السلطانية واوطنه وان يراعى احكام القانون الاساسى والوظيفة المودعة لعهدته وان يجتنب كل ما يخالف ذلك ومن لم يحضر فى ذلك اليوم من الاعضاء يحلف على الوجه المشروح عند اجتماع الهيئة بمعرفة رئيس هيئته

(المادة

﴿ المادة السابعة والاربعون ﴾ اعضاء المجلس العمومي يكونون احرارا في آرائهم ومطالعاتهم ولا يكون احد منهم تحت قيد تعليمات ووعد ووعيد ولا يتهم البتة من قبيل الاراء التي يعطيها ولا من جهة المطالعات التي يبينها في اثناء مذاكرات المجلس اذا لم تقع منه في جميع ذلك حركة مخالفة لنظام المجلس الداخلي فاذا وقع يعامل بحكم النظام المذكور

﴿ المادة الثامنة والاربعون ﴾ اذا احد اعضاء المجلس العمومي اتهم بالخيانة او بالتصدي لالغاء القانون الاساسي اونقضه اوفي احدى تهم الارتكاب وتقرر اتهامه بثلثي الاكثرية المطلقة من هيئة الاعضاء الموجودين في الدائرة المنسوب اليها او حكم عليه بجزاء موجب لحبسه اونفيه قانونيا تسقط عنه صفة العضوية اما محاكمة هذه الافعال ومجازاتها فتجريها المحكمة المنوط بها ذلك

﴿ المادة التاسعة والاربعون ﴾ لكل فرد من اعضاء المجلس العمومي ان يعطي رايه بالذات او يجتنب عن اعطاء رايه في رد تلك المادة الواقع عليها التذاكر او في قبولها

﴿ المادة الخمسون ﴾ لايمكن لاحد ان يكون عضوا في الهيئتين معا في وقت واحد

﴿ المادة الحادية والخمسون ﴾ لايبادر للمذاكرة في كلتا هيئتي المجلس العمومي ما لم تكن الاعضاء المرتبة في كل منها زائدة واحدا بالعدد عن النصف وكافة المذكرات تتقرر بالاكثرية المطلقة من الاعضاء الموجودين خلا تلك الخصوصات التي يشترط تقريرها باكثرية الثلثين ويعتبر رأي الرئيس رأيين عند تساوي الآراء

﴿ المادة الثانية والخمسون ﴾ اذا احد قدم لاحد هيئتي المجلس العمومي عرضحالا في دعوى متعلقة بشخصه وتبين انه لم يراجع في ذلك

مأموری الدولة العائدة لهم تلك الدعوی او لم یراجع المرجع التابعین له اولئك المأمورین فمرخصاله یرد

المادة الثالثة والخمسون ﴿ منوط بهیئة وكلاء الدولة التكلیف بتنظیم قانون مجدد او بتعدیل احد القوانین الموجودة ویحق لهیئة الاعیان وهیئة المبعوثان كذلك ان یستدعوا بتنظیم قانون لاجل المواد الموجودة داخل دائرة وظائفهم المعینة او بتعدیل احد القوانین الموجودة وحینئذ یستأذن عنها اولا من الحضرة السلطانیة بواسطة مقام الصدارة ومتی تعلقت الارادة السنیة یحال الی شوری الدولة تنظیم لوائحها علی مقتضی الایضاحات والتفصیلات التی تعطی من الدوائر المتعلق بها ذلك

﴿ المادة الرابعة والخمسون ﴿ ان لوائح القوانین التی تنتظم بالمذاكرة فی شوری الدولة فهذه بعد ان یجری علیها التدقیق والقبول فی هیئة المبعوثان وبعده فی هیئة الاعیان تكون دستورا للعمل اذا تعلقت الارادة السنیة باجراء احكامها ولائحة القانون المردودة من احدی الهیئتین ردا قطعیا لا یتكرر وضعها فی موقع المذاكرة فی المدة الاجتماعیة بتلك السنة

﴿ المادة الخامسة والخمسون ﴿ لا یعتبر احد القوانین مقبولا ما لم تقرأ لائحته بندا فبندا فی هیئة المبعوثان ثم فی هیئة الاعیان ویعطی علی كل بند علی حدته رأی ویقر علیه القرار باكثریة الاراء ثم ما لم بعد ذلك یقر القرار علی مجموع هیئتها تكرارا بالاكثریة

﴿ المادة السادسة والخمسون ﴿ علی الهیئتین ان لا تقبلا احدا یأتی الیهما بالاصالة عن نفسه او بالوكالة عن جماعة لاجل افادة مادة من المواد ولا تسمعا افادته اذا لم یكن من الوكلاء او من موكلیهم او من نفس اعضاء الهیئتین او من احد المأمورین المدعو رسمیا بالحضور الیهما

﴿ المادة السابعة والخمسون ﴿ مذاكرات الهیئتین تكون باللغة التركیة واللوائح

والالواح المقتضى اجراء المذاكرة عليها تطبع صورها وتتوزع على الاعضاء قبل يوم المذاكرة

المادة الثامنة والخمسون ـ الاراء التي تعطيها الهيئتان تكون بتعيين الاسماء او باشارات مخصوصة او بالرأى الخفى اما اجراء اصول الرأى الخفى فيتوقف اعطاء قراره على اكثرية اراء الاعضاء الموجودة

المادة التاسعة والخمسون ـ ان انضباط داخلية كل هيئة على حدتها محصور برئيسها

فى هيئه الاعيان

المادة الستون ـ لايتجاوز عدد اعضاء هيئة الاعيان ورئيسها نهاية ما يكون ثلث مقدار هيئة المبعوثان وتوظيفهم هو منوط رأسا بالحضرة السلطانية

المادة الحاديه والستون ـ لا يمكن ان يكون عضوا فى هيئة الاعيان الا من كان بالاقل بالغا سن الاربعين وهو من الذوات الذين حازت اثارهم وافعالهم وثوق العامة واعتمادها والمشهود لهم بحسن الخدمات المسبوقة فى امور الدولة

المادة الثانية والستون ـ عضويه هيئة الاعيان تبقى ما دامت الحيوه وبتعيين بهذه الماموريات ذوات من معزولى الوكلاء والولاة ومشيرى العسكرات وقضاة العسكر والسفراء والبطاركة ورؤساء الحاخامات ومن فرقاء البرية والبحريه ومن سائر الذوات الجامعى الصفات اللازمة ومن يتعين منهم فى غير ماموريات من ماموريات الدولة بناء على طلبه يسقط من ماموريه العضويه

المادة الثالثة والستون ـ ان المعاش الشهرى لكل من اعضاء

هيئة الاعيان هو عشرة الاف غرش واذا كان للاعضاء الموظفون معاش وتعيين من الخزينة باسم اخر اقل من عشرة الاف غرش فيبلغ القيمة المعنية واذا كان عشرة الاف غرش او ازيد يبقى على حاله

﴿ المادة الرابعة والستون ﴾ على هيئة الاعيان ان تجرى التدقيق على لوائح القوانين والموازنة التى تعطى لها من هيئة المبعوثان فاذا رات فيها اساسيا ما يمس الامور الدينية وحقوق حضرة الذات السلطانية السنية او ما يمس الحرية واحكام القانون الاساسى وتمام ملكية الدولة او ما يخل بامنية داخلية المملكة وباسباب المدافعة والمحافظة على الوطن او ما يخل بالاداب العمومية فلها حينئذ ان تورد مطالعاتها وتردها وترفضها قطعيا او تعيدها الى هيئة المبعوثان مصحوبة بملاحظاتها لاجل التعديل والتصحيح واللوائح التى تقبلها تصادق عليها وتعرضها على مقام الصدارة اما العرضحالات المتقدمة الى الهيئة فتجرى عليها التصديق ثم تقدمها الى مقام الصدارة مشفوعة بالمطالعات اذا رأت لذلك لزوما

﴿ فى هيئة المبعوثان ﴾

﴿ المادة الخامسة والستون ﴾ ان مقدار اعضاء هيئة المبعوثان يترتب باعتبار نفر واحد لكل خمسين الفا من ذكور التبعة العثمانية

﴿ المادة السادسة والستون ﴾ امر الانتخاب مؤسس على قاعدة الراى الخفى وصورة اجرائه ستعين بقانون مخصوص

﴿ المادة السابعة والستون ﴾ لا يمكن ان يجتمع بعهدة ذات واحدة عضوية هيئة المبعوثان ومأمورية الحكومة معا وانما تجاز العضوية لمن ينتخب من الوكلاء واذا انتخب لعضوية المبعوثان واحد من المامورين

المامورين فله الخيار في قبولها اورفضها ولكن اذا قبلها ينفصل عن ماموريته

﴿ المادة الثامنة والستون ﴾ ان الذين لا يجوز انتخابهم لهيئة المبعوثان هم اولا الذين ليسوا من تبعة الدولة العلية ثانيا الحائزون موقتا بموجب النظام المخصوص امتياز الخدمة الاجنبية ثالثا الذين لا يعرفون اللغة التركية رابعا الذين لم يكملوا سن الثلاثين خامسا من كان في خدمة احد حين الانتخاب سادسا من كان محكوما عليه بالافلاس ولم يعد اعتباره سابعا من اشتهر بسوء الاحوال ثامنا من حكم عليه بالحجر ولم يتمكن من رفعه تاسعا الساقط من الحقوق المدنية عاشرا المدعون التابعية الاجنبية فهولا لا يمكن ان يكونوا اعضاء في هيئة المبعوثان ويشترط في الانتخابات التي تجرى بعد اربع سنين على من يلزم ان يكون مبعوثا ان يقرأ اللغة التركية وان يكتب بها ايضا على قدر الامكان

﴿ المادة التاسعة والستون ﴾ ان انتخاب المبعوثان العمومي يجرى مرة واحدة في كل اربع سنين ومدة مأمورية كل مبعوث عبارة عن اربع سنين وانما يجوز تكرار انتخابه

﴿ المادة السبعون ﴾ يبتدأ بانتخاب المبعوثان العمومي اقلما يكون باربعة اشهر قبل تشرين الثاني الذي هو مبدأ اجتماع الهيئة

﴿ المادة الحادية والسبعون ﴾ كل عضو من هيئة المبعوثان لا يعتبر وكيلا عن الدائرة التي انتخبته وانما يكون حكم وكيل عموم العثمانيين

﴿ المادة الثانية والسبعون ﴾ المنتخبون يلتزمون بانتخاب المبعوثان من اهالي دائرة الولاية المنسوبين لها

﴿ المادة الثالثة والسبعون ﴾ اذا فسخت هيئة المبعوثان وتفرقت بالارادة السنية يبتدأ بانتخاب عموم المبعوثان مجددا على وجه ان يجتمعوا نهاية ما يكون في ستة اشهر بعد الفسخ

﴿ المادة الرابعة" والسبعون ﴾ اذا مات احد اعضاء هيئة" المبعوثان او وقع فى احد الاسباب المشروعة" المجبرية" او لم يداوم على المجلس مدة" طويلة او استعفى او سقط من الاعضاوية" لمحكومية او لقبوله مأموريه" فينتخب لمحله خلافه حسب الاصول ليلحق نهاية مايكون الاجتماع الآتى

﴿ المادة الخامسة والسبعون ﴾ ان الاعضاء التى تنتخب لمحل فى مقام الاعضاء المنحلين من العضوية تكون مامور يتهم حتى الانتخاب العمومى الآتى

﴿ المادة السادسة" والسبعون ﴾ يعطى من الخزينة" عشرون الف غرش لكل من المبعوثان عن كل اجتماع سنوى و يعطى له كذلك مصاريف الذهاب والاياب حكم المأمور الذى يكون معاشه خمسه" الاف غرش شهريا توفيقا لنظام ماموري الملكيه"

﴿ المادة" السابعة" والسبعون ﴾ ينتخب من طرف الهيئة" ثلاثة انفار لرئاسة" هيئة" المبعوثان وثلاثة" انفار لكل من الرئاسة" الثانية" والثالثة" مجموع ذلك تسع ذوات فيعرضون على الحضرة" السلطانية" فيترجح احدهم بالارادة" السنية" السلطانية للرئاسة" واثنين منهم كذلك لوكالتى الرئاسة" وتجرى ماموريتهم

﴿ المادة" الثامنة" والسبعون ﴾ مذاكرات هيئة" المبعوثان تكون علانية ولكن اذا وقع التكليف من جانب الوكلاء او من طرف خمس عشرة" ذاتا من هيئة" المبعوثان على ان تكون المذاكرات خفية" على احدى المواد المهمة" فيخلى محل هيئة" الاجتماع من الحاضرين فيه دون الاعضاء وتتراجع حينئذ الاراء فى رد هذا التكليف او قبوله

﴿ المادة" التاسعة" والسبعون ﴾ لا تحاكم احد الاعضاء او يوقف فى مدة" اجتماع هيئة" المبعوثان ما لم يعط قرار من الهيئة" باكثرية

باكثريه" الاراء على سبب كاف لاتهامه اوما لم يقبض عليه فى حال اجراء الجنايه" او الجنحه" اوعقيب اجراء ذلك

﴿ المادة" الثمانون ﴾ ان هيئه" المبعوثان تتذاكر على لوائح القوانين المحوله" اليها ولها ان تقبل من ذلك المواد المتعلقه" بالامور الماليه" والقانون الاساسى او ترفضها او تعدلها وبعد ان يجرى التدقيق بالتفصيل فى هيئة المبعوثان على المصارف العموميه" حسبماهو موضح فى قانون الموازنه" يعطى القرار على مقدارها مع الوكلاء ثم يتعين كذلك مع الوكلاء سويه" كميه" وكيفيه" ما يقابل ذلك من الواردات وصورة توزيعها وتداركها

﴿ فى المحاكم ﴾

﴿ المادة الحادية والثمانون ﴾ لا يعزل القضاة" المنتخبون توفيقا للاصول المخصوصة المنصوبون من طرف الدولة بموجب برآة" شريفه" بايديهم وانما يقبل استعفاؤهم اما ترقيات هولاء الحكام ومسلكهم وتبديل مامورياتهم وتقاعدهم او عزلهم بجرم محكوم به عليهم ذلك جميعه تابع لحكم قانونه المخصوص وهذا القانون يوضح الاوصاف المطلوبه" من القضاة" ومن ماموري المحاكم

﴿ المادة" الثانيه" والثمانون ﴾ كل انواع المحاكمات تجرى علانيه" فى المحاكم ويؤذن بنشر الاعلامات دائما وانما تستطيع المحكمة ان تجرى المحاكمة خفيا بناء على الاسباب المصرحة فى قانونها

﴿ المادة" الثالثه" والثمانون ﴾ يستطيع كل شخص ان يستعمل بحضور المحكمه" كل ما يراه لازما من الوسائط المشروعه" لمحافظه" حقوقه

﴿ المادة" الرابعه" والثمانون ﴾ لا يمكن للمحكمة باى حجه" كانت ان تمتنع عن رؤيه" الدعوى الداخلة ضمن دائره" وظيفتها وبعدان يكون ابتدى بفحص الدعوى او بما لزم من التحقيقات الاولية لا يجوز كذلك تعطيلها

او تعويقها ما لم يكف المدعى يده اما فى الدعاوى الجزائية فى مطلب الحقوق العائدة" للحكومة" فالدعوى تستمر فى مجراها على وفق النظام

﴿ المادة الخامسة والثمانون ﴾ كل دعوى تنظر فى المحكمة المتعلقة بها" اما الدعاوى الواقعة بين الحكومة والاشخاص فترى فى المحاكم العمومية

﴿ المادة السادسة والثمانون ﴾ المحاكم مصونة من كل انواع المداخلات

﴿ المادة" السابعة والثمانون ﴾ الدعاوى الشرعية ترى فى المحاكم الشرعية والنظامية فى المحاكم النظامية

﴿ المادة" الثامنة والثمانون ﴾ ان صنوف المحاكم ودرجات وظائفهم وصلاحيتهم وتقسيماتها وتوظيف الحكام جميعه مستند الى القوانين

﴿ المادة التاسعة والثمانون ﴾ لا يجوز البتة" ان يتشكل خارجا عن المحاكم العمومية محكمة فوق العادة اوقومسيون يكون فى وسعهما النظر فى بعض مواد مخصوصة والحكم عليهما وانما يجوز فقط تعيين المولى والتحكيم كما هو معين بالقانون

﴿ المادة التسعون ﴾ لا يمكن لاحد الحكام حال كونه بصفة الحاكمية ان يجمع فى عهدته كذلك مامورية اخرى ذات معاش من الدولة

﴿ المادة الحادية والتسعون ﴾ يعين مدعون عموميون مامورون بالمحاماة عن حقوق العامة فى الامور الجزائية" وتتعين وظائفهم ودرجاتهم بقانون

﴿ فى الديوان العالى ﴾

﴿ المادة الثانية والتسعون ﴾ الديوان العالى يركب من ثلاثين عضوا عشرة منهم من هيئة الاعيان وعشرة" من شورى الدولة وعشرة" يفرزون بالقرعة

بالقرعة من روساء واعضاء محكمى التميز والاستئناف ويعقد هذا الديوان فى دائرة هيئة الاعيان بالارادة السنية عند اللزوم ووظيفته انما هى محاكمة الوكلاء وروساء محكمة التميز واعضائها ومحاكمة كل من اعتدى على ذات الحضرة السلطانية وعلى حقوقها وكل من تصدى لالقاء الدولة فى خطر

﴿ المادة الثالثة والتسعون ﴾ يقسم الديوان العالى الى دائرتين احداهما الدائرة الاتهامية والثانية ديوان الحكم فاعضاء الدائرة الاتهامية تسعة منهم ثلاثة من هيئة الاعيان وثلاثة من ديوان التميز والاستئناف وثلاثة من اعضاء شورى الدولة وجميعهم ينتخبون بالقرعة من الاعضاء الذين يؤخذون للديوان العالى

﴿ المادة الرابعة والتسعون ﴾ ان هذه الدائرة تعطى القرار باكثرية الثلثين فى ان كان الذوات المشتكى عليهم متهمون او غير متهمين والموجودون فى الدائرة الاتهامية لا يوجدون فى ديوان الحكم

﴿ المادة الخامسة والتسعون ﴾ ان ديوان الحكم تكون اعضاؤه سبعة من هيئة الاعيان وسبعة من ديوان التميز والاستئناف وسبعة من روساء شورى الدولة واعضائه فيكون مركبا اذا من واحد وعشرين نفر من اعضاء الديوان العالى والاعضاء المرتبة كما ذكر يحكمون باكثرية الثلثين قطعيا وتطبيقا للقوانين الموضوعة على الدعاوى التى قرر قرار الدائرة الاتهامية على لزوم محاكمتها وحكمهم غير قابل الاستئناف والتميز

﴿ فى امور الماليه ﴾

﴿ المادة السادسة والتسعون ﴾ لا يمكن وضع احد تكاليف الدولة وتوزيعه واستحصاله ما لم يتعين بقانون

﴿ المادة السابعة والتسعون ﴾ ان ميزانية (بودجه) الدولة هي قانون مبين بالتقريب وارداتها ومصارفاتها وهو القانون المستند عليه بوضع تكاليف الدولة وتوزيعها وتحصيلها

﴿ المادة الثامنة والتسعون ﴾ ان البودجه اعني قانون الموازنة العمومية يقبل في المجلس العمومي بعد التدقيق عليه مادة فمادة والجداول المربوطة به الجامعة لمفردات الواردات والمصارفات المخمنة تنقسم الى اقسام وفصول ومواد متعددة توفيقا لانموذجها المتعين نظاما والمذاكرات عليها ايضا تجرى فصلا ففصلا

﴿ المادة التاسعة والتسعون ﴾ ان لائحة قانون الموازنة العمومية تعطى لهيئة المبعوثان عقب فتح المجلس العمومي ليمكن وضعه في موقع الاجراء قبل دخول السنة المتعلق بها

﴿ المادة المائة ﴾ لا يجوز صرف مال من اموال الدولة خارجا عن الموازنة ما لم يتعين ذلك بقانون مخصوص

﴿ المادة الواحدة بعد المائة ﴾ اذا تحقق لزوما قويا لاختيار مصاريف خارجة عن الموازنة لاسباب مجبرة فوق العادة في الوقت الذي لا يكون فيه المجلس العمومي منعقدا يجوز تدارك المبالغ اللازم لتسوية ذلك المصروف وصرفه بعد العرض عنه للحضرة السلطانية والاستئذان وصدور الارادة السنية بخصوصه على وجه ان تكون مسئوليه ذلك على هيئة الوكلا وانهم يعطون لائحة القانون المتعلقة به الى المجلس العمومي عقب فتحه

﴿ المادة الثانية بعد المائة ﴾ ان حكم قانون الموازنة هو عن سنة واحدة ولا يجرى حكمه خارجا عن تلك السنة وانما اذا فسخ مجلس المبعوثان لبعض احوال خارقة للعادة قبل ان يقرر الموازنة فوكلاء

الدولة اذا يعدون جريان احكام موازنة السنة السابقة لحد اجتماع
مجلس المبعوثان الاتى وذلك بقرار تتعلق عليه الارادة السنية على
وجه ان حكم القرار لا يتجاوز السنة الواحدة

﴿ المادة الثالثة بعد المائة ﴾ ان قانون المحاسبة القطعية يبين صحة
المبالغ المتحصلة من وارادات تلك السنة ومقدار الصرفيات الواقعة
بمصاريفها ويكون شكله وتقسيماته مطابقين بالتمام لقانون الموازنة
العمومية

﴿ المادة الرابعة بعد المائة ﴾ تعطى لائحة قانون المحاسبة القطعية
الى المجلس العمومى بعد اربع سنين نهاية ما يكون من اعتبار ختام
السنة المتعلقة بها

﴿ المادة الخامسة بعد المائة ﴾ يترتب ديوان محاسبات لرؤية محاسبات
مأمورى قبض اموال الدولة وصرفها وللتدقيق على محاسبات السنة
التى تنظمها الدوائر على وجه ان الديوان المذكور يعرض على هيئة
المبعوثان مرة فى السنة خلاصة تدقيقاته ونتيجة مطالعاته بتقرير
مخصوص وعليه ايضا ان يعرض على الحضرة السلطانية مرة فى كل
ثلاثة اشهر تقريرا عن احوال المالية بواسطة رئاسة الوكلاء

﴿ المادة السادسة بعد المائة ﴾ تتركب اعضاء ديوان المحاسبات
من اثنى عشر شخصا وينصب كل منهم بالارادة السنية ويستمر فى
مأموريته ما دامت الحيوة ولا ينفصل عنها ما لم تصادق هيئة
المبعوثان بالاكثرية على لزوم عزله

﴿ المادة السابعة بعد المائة ﴾ تتعين اوصاف اعضاء ديوان المحاسبات
وتفصيل وظائفهم وصورة استعفائهم او تبديلهم او ترقيهم او تقاعدهم
وكيفية تشكيل اقلامهم وترتيبها بنظام مخصوص

في الولايات

المادة الثامنة بعد المائة — تأسس اصول ادارة الولايات على قاعدة توسيع دائرة المأذونية وتفريق الوظائف وتعين درجاتها بنظام مخصوص

المادة التاسعة بعد المائة — توسع بقانون مخصوص صورة انتخاب اعضاء مجالس الادارة في مراكز الولايات والالوية والقضاوات وانتخاب اعضاء المجلس العمومي الذي يجتمع مرة واحدة في السنة في مركز كل ولاية على حدتها

المادة العاشرة بعد المائة — تبين وظائف اعضاء المجالس العمومية في الولايات بقانون مخصوص يوضع لها ويشتمل كذلك على المذاكرات في مطلب تنظيم الطرق والمعابر وتشكيل صناديق الاعتبار وتسهيل الصنائع والتجارة والفلاحة وما يجرى مجراها من الامور النافعة وعلى ما يتعلق ايضا بانتشار المعارف والتربية التي تعود منفعتهما على العموم ويحتوى على ما لهذه المجالس من الصلاحية بعرض الاشتكا للمقامات والمواقع الذى يقتضى تبليغ الشكايات لها عند ما يرى ما يخالف احكام القوانين والنظامات الموضوعة في مطلب صورة توزيع التكاليف والمرتبات الاميرية واستحصالها وفي مطلب سائر المعاملات وذلك لقصد سد الخلل واصلاحه

المادة الحادية عشرة بعد المائة — يكون في كل قضاء لكل ملة على حدتها مجلس جماعة للنظارة على صرف اموال الوصية للموصى لهم على ما هو محرر في الوصايا على وجه ان تصرف حاصلات المسقفات والمستغلات والنقود الموقوفة الى المشروط لهم والى الخيرات والمبرات

دائرة

وفاقا الشرط الوقفية والتعامل القديم وللنظارة كذلك على صورة ادارة لموال الايتام توفيقا لنظامها المخصوص وهذه المجالس تتركب من افراد منتخبين من كل ملة على حدة على مقتضى النظامات المخصوصة التى تترتب فى هذا المطلب وعلى هاته المجالس ان تعترف بان مرجعها انما هو حكوماتها المحلية ومجالس الولايات العمومية

﴿ المادة الثانية عشرة بعد المائة ﴾ تدار الامور البلديه فى دار السعاده والمحلات الخارجه عنها بواسطة مجالس الدوائر البلديه التى تترتب بالانتخاب وصوره تشكيل هذه الدوائر ووظائفها وكيفية انتخاب اعضائها ستتعين بقانون مخصوص

﴿ فى مواد شتى ﴾

﴿ المادة الثالثة عشرة بعد المائة ﴾ اذا شهد امارت واثار تؤيد ظهور اختلال فى احدى جهات الممالك فيحق للحكومة السنيه والحالة هذه ان تعلن موقتا ومخصوصا « الادارة العرفيــة » فى ذلك المحل والادارة العرفيه انما هى تعطيل القوانين والنظامات الملكية موقتا والمحل الذى يوضع تحت الادارة العرفية تتعين صوره ادارته بنظام مخصوص ومن ثبت عليهم بتحقيقات ادارة الضابطة الموثوقة بانهم اخلوا بامنية الحكومة يكون اخراجهم من الممالك المحروسة وتبعيدهم عنها منحصرا بيد اقتدار الحضرة السلطانية

﴿ المادة الرابعة عشرة بعد المائة ﴾ افراد العثمانيين مجبورون على تحصيل المرتبة الاولى من المعارف وستتعين درجات ذلك وفروعه بنظام مخصوص

المادة الخامسة عشرة بعد المائة ❊ لاتعطل البتة مادة من مواد القانون الاساسى ولا تسقط من الاجراء باى حجة اوسبب كان

المادة السادسة عشرة بعد المائة ❊ اذا شهد لزوم صحيح قطعى حسب ايجاب الوقت والحال لتغيير بعض مواد القانون الاساسى وتعديلها يجوز تعديلها على الشروط الآتية وهى اولا ان يقع التكليف المتعلق بالتعديل من هيئة الوكلاء او من هيئة الاعيان او من هيئة المبعوثان ثانيا ان يقبل التكليف المذكور فى هيئة المبعوثان باكثرية الثلثين ثم يصادق على قبوله من هيئة الاعيان ايضا باكثرية الثلثين فمتى تم ذلك وتعلقت على هذا المركز الارادة السنية تصير حينئذ تلك التعديلات دستورا للعمل اما المادة الواقع التكليف على تعديلها من القانون الاساسى فتستمر مرعية الاجراء من غير ان تفقد قوتها وحكمها الى ان تتم المذاكرات اللازمة بتعديلها وتتعلق بخصوصها الارادة السنية

المادة السابعة عشرة بعد المائة ❊ اذا لزم الامر لتفسير مادة قانونية وكانت متعلقة بالامور العدلية فعلى محكمة التمييز تعيين معناها واذا كانت متعلقة بالادارة الملكية يناط تعيين معناها بشورى الدولة اما اذا كانت من متعلقات هذا القانون الاساسى فتعيين معناها منوط بهيئة الاعيان

المادة الثامنة عشرة بعد المائة ❊ ان النظامات والتعامل والعادات الموجودة الان دستورا للعمل تستمر مرعية الاجراء ما دامت لا تلغى او تعدل بالقوانين والنظامات التى توضع فى المستقبل

المادة التاسعة عشرة بعد المائة ❊ ان احكام التعليمات الموقتة المتعلقة بالمجلس العمومى المؤرخة فى ١٠ شوال سنة ١٢٩٣ تجرى فقط لختام مدة انعقاد المجلس العمومى الذى يجتمع فى المرة الاولى ولايكون حكمها جاريا بعد ذلك

٨١٨٣

خ١٢٤ ٨٠٨٣ ع ٣٢٠٤٩٥٦

الخط الشريف السلطاني والقانون الاساسي

DATE	NO	DATE	NO

طلاقه عليها - و كذا الايلاء و الظهار - و ان مات احدهما يتوارثان - و على قول محمد رح ان طلقهـــا زوجها قبل المرافعة الى القاضي يكون متاركة - حتى لو اجاز الولي بعد ذلك نكاح المرأة لا يصح اجازته - لكن لا تحرم المرأة بهذا الطلاق - و ان طلقها الرجل ثلثا كره له ان يتزوجها قبل التزوج بزوج آخر *

٩٠ و اجمعوا على انها لو اقرت بالنكاح صح اقرارها * 90

٩١ و من شرائط النكاح رضاء المرأة اذ كانت بالغة بكرا كانت او ثيبة 91
فلا يملك الولي اجبارها على النكاح عندنا *

٩٢ فان استأمرها الاب قبل النكاح فقال ازوجك و لم يذكر المهر ولا الزوج 92
فسكتت لا يكون سكوتها رضا - و لها ان ترد بعد ذلك - و كذا لو قال ازوجك جيراني او بني عمي و هم لا يحصون - لان الرضا بالمجهول لا يتحقق *

٩٣ و ان ذكر الزوج و المهر في الاستيمار فسكتت كان سكوتها رضا - و ان ذكر 93
الزوج و لم يذكر المهر فسكتت قالوا ان وهبها من[٢] رجل نفذ نكاحه - لانها رضيت بنكاح لا تسمية فيه - و الظاهر هو النكاح بمهر المثل - و النكاح بلفظة الهبة يوجب مهر المثل - و ان زوجها بمهر مسمى لا ينفذ نكاح الولي - لانها ما رضيت بتسمية الولي - فلا ينفذ نكاح الولي الا باجازة مستقبلة *

٩٤ و ان زوجها الولي بغير استيمار ثم اخبرها بعد النكاح فسكتت ان اخبرها 94
بالنكاح و لم يذكر الزوج و المهر اختلفوا فيه - و الصحيح انه لا يكون رضا كما لو استأمرها قبل النكاح ولم يذكر الزوج و المهر - و ان ذكر الزوج و المهر جميعا فسكتت كان رضى - و ان ذكر الزوج و لم يذكر المهر فهو على

(٢ ن) لرجل *

التفصيل الذي تقدم في الاستيمار قبل النكاح - و ان ذكر المهر و لم يذكر الزوج فسكتت لم يكن السكوت رضى استأمرها قبل النكاح او اخبرها بعد النكاح - لان الزوج اصل فجهالته تمنع الرضا *

۹۵ و ان سمى الولي رجلا في الاستيمار قبل النكاح فقالت غيره احب اليّ لم يكن ذلك اذنا - و ان كان ذلك بعد النكاح لم يكن قولها غيره احب اليّ رد النكاح - لان هذا الكلام محتمل - فلا يبطل به النكاح المنعقد و قبل النكاح وقع الشك في انعقاده فلا ينعقد بالشك * 95

۹۶ بكر زوجها وليها فبلغها الخبر فضحكت كان ذلك رضا - لان الضحك امارة السرور - و ان بكت اختلفوا فيه - و الصحيح ان البكاء اذا كان بخروج الدمع من غير صوت يكون رضا - و ان كان مع الصوت و الصياح لا يكون رضا - و ان اخذها السعال او العطاس حين اخبرت فلما ذهب السعال او العطاس قالت لا ارضى صح ردها - و كذا لو اخذ فمها ثم ترك فقالت لا ارضى صح الرد - لان السكوت كان عن اضطرار(۲) * 96

۹۷ و لو قال لها قبل النكاح ان فلانا يخطبك فقالت لا تزوجني من فلان فاني لا اريده فزوجها فبلغها الخبر فسكتت جاز النكاح - لان الرد قبل النكاح لا يدل علي الرد بعده - لاحتمال تبدل الحال - و لو قالت بعد النكاح قد كنت قلت اني لا اريد فلانا و لم تزد علي ذلك لا يجوز النكاح - لانها اخبرت بعد العقد انها علي الحالة الاولي - لم يتبدل حالها * 97

۹۸ بالغة زوجها وليها فبلغها الخبر فقالت لا اريد الزوج او قالت لا اريد فلانا يكون ردا - و قال بعضهم ان قالت لا اريد الزوج لا يكون ردا - و الصحيح هو الاول - لان قولها لا اريد الزوج رد لجميع الازواج فيكون ردا لفلان و غيره * 98

(۲ ن) اضطرارا *

٩٩ و لوزوجها الولي فردت ثم قال لها في مجلس آخر ان اقواما يخطبونک فقالت انا راضية بما تفعل فزوجها الولي من الاول فابت ان تجيز نكاحه كان لها ذلک - لان قولها انا راضية ينصرف الى غير الاول - لان تقدير كلامهما كانه قال لها اذا ابيت فلانا فقد خطبک قوم آخرون فقالت انا راضية بما تفعل سوى الاول - و هذا كرجل طلق امرأته فقال لرجل اني كرهت صحبة فلانة فطلقتها فزوجني امرأة ترضاها لي فزوج المطلقة لا يجوز و يكون الامر على غيرها - و كذا لوباع عبده ثم امر انسانا ان يشتري له عبدا فاشترى ذلک العبد لا يجوز فكذا هنا * 99

١٠٠ الولي اذا زوج البكر البالغة ثم اختلف الزوج و المرأة فقال الزوج بلغک النكاح وسكت(٢) فقالت لا بل رددت كان القول قولها عندنا - كالمستعير اذا ادعى رد الوديعة و انكر المعير كان القول قول المستعير - لانه ينكر وجوب الضمان على نفسه كذا ههنا - لان الزوج يدعي لزوم العقد والمرأة تنكر فكان القول قولها - و ان اقاما البينة كانت البينة بينة المرأة على الرد - لانها قامت على الاثبات صورة وبينة الزوج قامت على النفي - و ان اقام الزوج بينة انها اجازت العقد و اقامت المرأة بينة على الرد كانت البينة بينة الزوج - لانهما استويا في الاثبات صورة - و بينة الزوج ترجحت بلزوم العقد ولا يمين عليها في قول ابي حنيفة رح - و ان كان الزوج دخل بها طوعا لم تصدق في دعوى الرد - و ان كان دخل بها كرها صدقت في دعوى الرد * 100

١٠١ السكوت جعل رضا في مسائل معدودة - منها بكر زوجها وليها فعلمت بذلک فسكتت كان سكوتها رضا - ومنها اذا تواضع رجلان في السر انّا 101

(٢ ن) فسكت *

نظهر البيع علانية و هو بيننا تلجية ثم قال احدهما لصاحبه انا قلنا في السر هكذا و قد بدأ لي ان اجعله بيعا صحيحا فسكت الآخر ثم تبايعا كان البيع صحيحا (٢) - و منها اذا اسر المشركون عبدا لرجل ثم وقع في الغنيمة بعد ذلك و قسم و مولاه الاول حاضر فسكت و لم يطلب العبد بطل حقه في اخذ العبد - و منها المشتري اذا قبض المبيع قبل نقد الثمن و البائع يراه و لم يمنعه من القبض كان اذنا - و منها المولى اذا رأى عبده يبيع و يشتري ولم يمنعه فسكت يكون ذلك اذنا و منها رجل اشترى عبدا على انه بالخيار ثلثة ايام فرأى المشتري العبد يبيع و يشتري فسكت لزمه البيع و بطل خياره - و ان كان الخيار للبائع لا يبطل خياره - و منها الشفيع اذا علم بالبيع فسكت بطلت شفعته - و منها اذا بيع العبد و هو حاضر فسكت - و في بعض الروايات فانقاد للبيع و التسليم ثم قال انا حر لا يقبل قوله - و منها رجل قال و الله لا انزل فلانا في داري و فلان نازل فيها فسكت الحالف يحنث في يمينه (٣) - و لو قال له الحالف اخرج فابى ان يخرج فسكت الحالف بعد ذلك لا يحنث في يمينه - و منها امرأة ولدت ولدا فهنى الناس زوجها بالولد فسكت لزمه الولد - حتى لا يملك نفيه بعد ذلك - و منها الموهوب له اذا قبض الهبة في مجلس الهبة فسكت الواهب يكون ذلك اذنا بالقبض - و يتم الهبة استحسانا - و كذلك في البيع الفاسد على الرواية التي يعتبر القبض باذن البائع لافادة الملك اذا قبض بحضرة البائع و البائع سكت (٤) صح قبضه و يفيد الملك - و منها ام ولد جاءت بولد فسكت

(٢ ن) كان بيعا صحيحا * (٣ ن) حنث * (٤ ن) يسكت *

المولى حتى مضى يوم او يومان لزمه الولد و لا يصح نفيه بعد ذلك *

١٠٢ و لو زوجت المرأة نفسها من غير كفوء فبلغ الولي فسكت الولي 102
لم يكن رضا - فان قبض مهرها و جهزها به كان رضا - و ان خاصم الزوج
في المهر و النفقة في القياس لا يكون رضا - و في الاستحسان يكون رضا *

١٠٣ رجل زوج ابنته البكر البالغة من غير كفؤ فعلمت بذلك فسكتت 103
قال بعضهم سكوتها لا يكون رضا - و قال بعضهم في قول ابي حنيفة رحمه الله
يكون رضا - لان على قول ابي حنيفة رحمه الله الاب ولي في الانكاح
من غير كفؤ - و لو كانت صغيرة يلزم العقد - فاذا كانت كبيرة يتوقف
على الرضا - كما لو زوجها من كفؤ - و الجد عند عدم الاب في ذلك بمنزلة
الاب - اما غير الاب و الجد ليس بولي في الانكاح من غير كفوء - فلم يكن
سكوتها رضا - كما لو زوجها الاجنبي من كفوء فسكتت لا يكون سكوتها رضا
و لابد من النطق *

١٠٤ رجل قال لاجنبية اني اريد ان ازوجک من فلان فقالت بالفارسية 104
تو به داني قال الفقيه ابو الليث رح لا يكون ذلک اذنا - و قال بعضهم
قولها تو به داني و قولها تو داني في عرف بلادنا يكون اذنا - و ان
قالت ذلک اليک يكون توكيلا في قولهم *

١٠٥ و ذكر الناطفي عن ابي يوسف رح عبد استأذن مولاه في التزوج فقال 105
المولى انت اعلم لا يكون اذنا - و لو قال ذلک اليک كان اذنا و تفويضا *

١٠٦ رجل تزوج امرأة بغير اذنها فبلغها الخبر فقالت باک نيست قال 106
بعضهم يكون اجازة - و الاولى ان لا يكون اجازة *

١٠٧ رجل زوج ابنته البالغة فلما بلغها الخبر فلم تتكلم ثم سئلت في اليوم الثاني 107
فقال لا ارضى بما فعل ابي تزوجت بآخر قال ابو القاسم الصفار رح لو

لم تعلم الزوج او لم تعلم الصداق فلما علمت بذلك فردت بطل نكاح الاب *

١٠٨ بكر زوجها وليها فقالت بعد سنة حين بلغني النكاح قلت لا ارضى كان 108
القول قولها - و لو قالت بلغني النكاح قبل سنة فرددت لا يقبل قولها
و لو بلغها الخبر و عندها قوم فقالت قد رددت النكاح حين بلغني الا انهم
لم يسمعوا ذلك مني لا يقبل قولها - لان القوم اذا لم يسمعوا ردها كان
الثابت عندهم سكوتها فيثبت الرضا *

١٠٩ صغيرة زوجها وليها غير الاب و الجد فقالت بعد ما ادركت اني قد 109
اخترت نفسي حين ادركت لا يقبل قولها - بخلاف الفصل الاول لان
خيار البلوغ فسخ للنكاح النافذ فكانت مدعية بابطال الملك الثابت *

١١٠ رجل زوج ابنته البالغة و لم يعلم الرضا و الرد حتى مات زوجها فقالت 110
ورثة الزوج انها زوجت بغير امرها و لم تعلم بالنكاح و لم ترض فلا ميراث
لها و قالت هي زوجني ابي بامري كان القول قولها - و لها الميراث
و عليها العدة - و ان قالت زوجني ابي بغير امري فبلغني الخبر فرضيت
لا مهر لها و لا ميراث - لانها اقرت ان العقد وقع غير نافذ فاذا ادعت
النفاذ بعد ذلك لا يقبل قولها لمكان التهمة *

١١١ بكر زوجها ابن عمها من نفسه و هي بالغة فبلغها الخبر فسكتت ثم قالت 111
لا ارضى كان لها ذلك - لان ابن العم كان اصيلا في نفسه فضوليا في جانب
المرأة - فلم يتم العقد في قول ابي حنيفة و محمد رحمهما الله تعالى
فلا يعمل الرضا - و لو استأمرها في التزويج من نفسه فسكتت ثم زوجها
من نفسه جاز اجماعا *

١١٢ رجل زوج رجلا امرأة بغير اذنه فبلغه الخبر فقال نعم ما صنعت[٢] او 112

(٢ ن) صنع *

بارک الله لنا فيها او قال احسنت او اصبت کان اجازة الا اذا علم انه اراد به الاستهزاء بسوق الکلام علی وجه الاستهزاء فح لا يکون اجازة هکذا ذکر الشيخ الامام المعروف بخواهر زاده رح في شرح الاکراه عن ابي نصر بن سلام عن محمد بن سلمة رح - و لو قال لا بأس فانه لا يکون اجازة - و روی هشام عن محمد رح قوله نعم ما صنعت او احسنت او اصبت يکون اجازة - و بئس ما صنعت لا يکون اجازة - و لو قال اسأت قيل انه اجازة - لو هذاه القوم فقبل التهنئة کان اجازة ٭

١١٣ صبي تزوج بالغة فغاب فلما حضر تزوجت المرأة بزوج آخر و قد کان الصبي اجاز بعد بلوغه النکاح الذي باشره في الصغر فان کانت المرأة تزوجت بزوج آخر قبل اجازة الصبي جاز النکاح الثاني - لانها تملک الفسخ قبل اجازة الصغير - و ان کان النکاح الثاني بعد اجازة الصغير ينظر ان کان النکاح في الصغر بمهر المثل او بما يتغابن الناس فيه لا يجوز النکاح الثاني - لانه کان موقوفا فينفذ باجازة الصبي بعد البلوغ - و ان کان بمهر کثير لا يتغابن الناس فيه و للصغير اب او جد فکذلک - لانهما يملکان النکاح عليه بمهر کثير فيتوقف عقد الصغير علی اجازتهما - فينفذ بالاجازة بعد البلوغ - و ان لم يکن للصغير اب او جد جاز النکاح الثاني من المرأة - لان عقد الصغير علی هذا الوجه لم يتوقف - فلا يلحقه الاجازة ٭ 113

١١٤ رجل زوج ابنته الصغيرة من ابن کبير لرجل و قبل اب الابن بغير امر الابن ثم مات اب الصغيرة قبل ان يجيز الابن الکبير بطل النکاح - لان اب الصغيرة کان يملک فسخ هذا النکاح الموقوف - و کان موته قبل النفاذ بمنزلة الفسخ - کالمرأة اذا زوجت نفسها من رجل غائب و قبل عن الغائب فضولي کان للمرأة ان يفسخ ذلک النکاح - و موتها قبل النفاذ يکون فسخا 114

فكذلك ههنا - و لو ان رجلا زوج ابنته البالغة من رجل غائب و قبل عن الزوج فضولي فمات اب المرأة قبل اجازة الغائب لا يبطل نكاح الاب بموته - لان الاب لو اراد فسخ النكاح لا يملك في قول ابي يوسف و محمد رح لانه فضولي فلا يبطل النكاح بموته *

١١٥ رجل زوج ابنه البالغ امرأة بغير اذنه فجن الابن قبل الاجازة قالوا ينبغي للاب ان يقول اجزت النكاح على ابني - لان الاب يملك انشاء النكاح عليه بعد الجنون فيملك الاجازة * 115

١١٦ عبد تزوج امرأة بغير اذن المولى ثم امرأة و ثم امرأة فبلغ المولى فاجاز الكل فان لم يكن دخل بهن جاز نكاح الثالثة - لان الاقدام على نكاح الثالثة كان فسخا لنكاح الاولى و الثانية - فيتوقف نكاح الثالثة - فينفذ باجازة المولى - و ان كان دخل بهن لا يصح نكاحهن - لان الاقدام على نكاح الثالثة في عدة الاولى و الثانية لم يصح - فلم يكن فسخا لما قبلها - فلا تصح اجازة المولى - كما لو تزوجهن في عقد [٢] واحد * 116

١١٧ و كذا الحر اذا تزوج عشر نسوة بغير اذنهن في عقد متفرقة فبلغهن فاجزن جميعا جاز نكاح التاسعة و العاشرة - لانه لما تزوج الخامسة كان ذلك فسخا لنكاح الاربع قبلها - فاذا تزوج التاسعة كان ذلك فسخا لنكاح الاربع قبلها فيتوقف نكاح التاسعة و العاشرة على اجازتهما * 117

١١٨ امة تزوجت بغير اذن المولى ثم باعها المولى فاجاز المشتري نكاحها ان كان الزوج دخل بها صح اجازة المشتري - و ان لم يكن دخل بها الزوج لا تصح اجازة المشتري - لانه اذا لم يكن دخل بها حلت للمشتري بملك اليمين - و الحل البات اذا طرى على الحل الموقوف يبطله - و اما اذا 118

(٢ ن) عقدة واحدة *

دخل بها الزوج يجب عليها العدة بهذا الدخول - فلا يحل فرجها للمشتري فيصح اجازة المشتري *

١١٩ و كذا الامة اذا تزوجت بغير اذن المولى فمات المولى قبل الاجازة فاجاز 119
الوارث نكاحها ان كان المورث او الزوج دخل بها صحت اجازة الوارث - لانها لا تحل للوارث - و ان كان لم يدخل بها المورث و لا الزوج لا يصح اجازة الوارث - لان الوارث ملكها بموت المورث و حلت له فيبطل النكاح الموقوف *

١٢٠ ام ولد تزوجت بغير اذن المولى ثم اعتقها فان لم يدخل بها الزوج 120
قبل العتق لم يجز النكاح بموت المولى - لانه وجب عليها عدة العتق و العده تمنع نفاذ النكاح - و ان كان الزوج دخل بها قبل العتق جاز النكاح بموت المولى - لان قيام عدة الزوج يمنع وجوب عدة العتق *

١٢١ و كذا المكاتبة اذا تزوجت بغير اذن المولى فمات المولى فاجاز الوارث نكاحها 121
صحت اجازته لانها لا تورث - فينفذ النكاح باجازة الوارث *

١٢٢ ولي الصغير و الصغيرة اذا قال زوجت الصغير او الصغيرة امس لا يصدق 122
الا بالبينة او بتصديق الصغير بعد البلوغ في قول ابي حنيفة رح - وكذلك مولى العبد اذا اقر بالنكاح و وكيل المرأة و وكيل الرجل - و قال صاحباه رح يصدق - و مولي الامة يصدق بالاجماع - و اختلفوا في موضع الخلاف - قيل الخلاف فيما اذا بلغ الصغير و انكر النكاح فاقر الولي - اما لو اقر الولي بالنكاح في الصغير صح اقراره - و الصحيح ان الخلاف فيما اذا اقر في صغرهما فبلغا و انكرا لم يصح اقراره - و لو انكر العبد قبل العتق او بعده لم يصح عليه اقرار المولي في قول ابي حنيفة رح *

١٢٣ و سكوت البكر جعل رضى في استيمار الولي قبل النكاح - و كذا اذا 123
زوجها ثم اخبرها - وكذا اذا ارسل اليها رسولا في الاستيمار او في الاخبار *

١٢٤ و لا يشترط العدد و لا العدالة في الرسول - فان اخبرها فضولي لا بد من 124
العدد و العدالة *

١٢٥ و سكوت الثيب لا يكون رضى - و لو صارت ثيبا بالوثبة او بمبالغة 125
الاستنجاء او بمرور الزمان كان سكوتها رضى - و كذا اذا صارت ثيبا بالزنا
في قول ابي حنيفة رح - و لو صارت ثيبا بالوطي في نكاح او شبهة
نكاح او ملك يمين لا يكون سكوتها رضى - و لو خلا بها زوجها ثم وقعت
الفرقة بينهما فقالت لم يدخل بي تزوج كما تزوج الابكار *

١٢٦ و لو زوجها الولي الابعد فعلمت بذلک فسكتت لم يكن سكوتها رضا اذا 126
لم يكن الاقرب غائبا غيبة منقطعة *

١٢٧ و لو كان اب البكر عبدا فزوجها الاخ الحر فعلمت فسكتت كان 127
سكوتها رضا *

١٢٨ و القاضي عند عدم الاولياء بمنزلة الولي في ذلک * 128

١٢٩ الولي اذا زوج الثيب فرضيت بقلبها و لم تظهر الرضا بلسانها كان لها 129
ان ترد بعد ذلک - و لا يعتبر الرضا بالقلب - و انما المعتبر في الثيب
الرضاء باللسان او الفعل الذي يدل على الرضاء - نحو التمكين من الوطي
و طلب المهر و قبول المهر دون قبول الهدية *

١٣٠ و كذلک في حق الغلام * 130

١٣١ و اذا سأل الشهود الجارية عن رضاها بالنكاح و لم ينظروا الى وجهها 131
فسكتت ان لم تنكر الجارية الرضاء جاز النكاح فيما بينهم و بين ربهم
و ان انكرت الجارية الرضاء لا يجوز لهم ان يشهدوا على رضاها حتى ينظروا
الى وجهها و يسألونها فتسكت ان كان بكرا او تتكلم ان كانت ثيبا *

١٣٢ الثيب اذا زوجت بغير امرها بالف درهم فبلغها فقالت اجزت النكاح 132

علی خمسین دینارا او قالت اجزت النکاح علی ان یزید لي کذا او قالت لا اجیز النکاح الا بزیادة کذا لم یکن ذلک ردا - و لا یبطل نکاحها - حتی لو اجازت بعد ذلک صح اجازتها - و لو قالت لا اجیز النکاح و لکن زد لي یکون ذلک ردا *

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و اخذت منک بغير حق فانا ضامن لک بذلک فيصح هذا الضمان و ان كانت المرأة صغيرة قالوا الحيلة في ان لايكون الزوج مطالبا بالاجماع ان يقول الاب وقت عقد النكاح بالفارسية دختر خويش فلانه را بتو بزني دادم بدو هزار درم بدانكه پانصد درم ترا بود فانه يصح ذلک - و يصير هذا الكلام للاستثناء - كانه قال زوجت ابنتي بالفي درهم الا خمسمائة فيصح ذلک عند الكل - فكذلک الوكيل - و حيلة اخري ان يشتري اب الصغيرة من زوجها بعد النكاح عرضا قليل القيمة بمقدار ما يريد ان يحط عن مهر الصغيرة من زوجها فيصير الاب مستوفيا ذلک من مهرها بثمن العرض *

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ما ذكر شرا مما ظهر و هو كفوء لها بما ظهر بان تزوج عربية علي انه عربي
فظهر انه قرشي او ذكر انه عجمي فاذا هو عربي كان العقد لازما - [illegible]
ـاح لم يكن له [illegible]
ما ظهر خيرا مما ذكر و ليس بكفوء لها با[illegible]
ـن تزوج قرشية على انه عجمي
فاذا هو عربي كان النكاح لازما [illegible] في حقها - و يكون للاولياء حق الاعتراض
و ان كان ما ظهر شرا مما ذكر و ليس بكفوء لها بما ظهر بان تزوج عربية
على انه عربي فاذا هو عجمي كان لها حق الفسخ - و ان رضيت كان
للاولياء حق الفسخ - و ان كان ما ظهر شرا مما ذكر و هو كفوء لها بان تزوج
عربية على انه قرشي فاذا هو عربي كان لها حق الفسخ عند اصحابنا
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اهل بيته الصلاح فالنكاح باطل - لان والد الصغيرة لم يرض لعدم الكفاءة
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٣٢٤ رجل وطئ امرأة ابيه حرمت على ابيه - و كان على الاب كل المهر 324
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٣٢٥ و ان قبل امرأة ابيه عن شهوة حرمت على ابيه - و يجب المهر على 325
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٣٢٦ و لا يحل للرجل ان يتزوج حرة طلقها ثلثا قبل اصابة الزوج الثاني 326
و لا امة طلقها ثنتين - و كما لا يجوز له نكاحها لا يحل له وطئها بملك اليمين *

فصل في اقرار احد الزوجين بالحرمة - و فساد النكاح بسبب النسب و بطلان النكاح بملک اليمين *

٣٢٧ المطلقة الثلث اذا اتت الزوج الاول و قالت تزوجت بزوج آخر و دخل بي و طلقني و انقضت عدتي ان كانت ثقه و وقع عند الاول انها صادقة و كان ذلک بعد مدة تنقضي فيها العدتان و ذلک اربعة اشهر فصاعدا حل للزوج الاول ان يتزوجها - و ان كان بعد مدة لا ينقضي فيها العدتان لا يحل - و كذا لو اقرت المرأة بذلک و انكر الزوج الثاني حل نكاحها للاول و لو اقر الزوح الثاني بذلک و انكرت المرأة دخول الثاني لا يحل للاول و ان كان الاول تزوجها بعد مدة و لم تقل المرأة شيئا ثم قالت تزوجتني و كنت في عدة الثاني او قالت كنت تزوجت بالزوج الثاني و لم يدخل بي قالوا ان كانت عالمة بشرائط الحل للاول لا يقبل قولها - و للاول ان يمسکها - و ان كانت جاهلة قبل قولها * 327

٣٢٨ و كذا الرجل اذا تزوج امرأة كانت منكوحة الغير قد طلقها فقالت المرأة للثاني تزوجتني و انا معتدة عن الاول قال الشيخ الامام ابو بكر محمد بن الفضل رح ان كان بين نكاح الثاني و طلاق زوجها الاول شهران لا يقبل قولها في قول ابي حنيفة و ابي يوسف رحمهما الله تعالى - و يكون اقدامها على النكاح اقرارا منها بانقضاء العدة - و ان كان بين طلاق الاول و نكاح الثاني اقل من شهرين كان القول قولها - و يفرق بينها و بين الثاني و هذا بخلاف ما اذا طلق الرجل امرأته ثلثا ثم تزوجها بعد مدة فقالت تزوجتني قبل ان اتزوج بزوج آخر كان القول قولها - و لا يكون اقدامها على نكاح الاول اقرارا منها على انها تزوجت بزوج آخر - لان 328

انقضاء العدة لا يعرف الا بقولها - فجعل اقدامها على النكاح بمنزلة اقرارها بانقضاء العدة - و لا كذلک النكاح - لان الوقوف على نكاح الثاني ممكن - فلم يجعل اقدامها اقرارا منها بوجود النكاح - فان كان الزوج الاول تزوجها بعد شهور ثم قال لها تزوجتک قبل اصابة الزوج الثاني او تزوجتک قبل نكاح الثاني و قالت المرأة لا بل كان بعد ذلک كان القول قول المرأة - و يفسد النكاح باقرار الزوج - و لها عليه نصف المسمى ان كان لم يدخل بها - و الكل ان كان دخل بها *

٣٢٩ اذا تزوج الرجل امرأة قد كان لها زوج طلقها فقال الزوج الثاني تزوجتک 329
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٣٣٠ امرأة زوجت بزوج و دخل بها ثم قالت لم اكن رضيت بنكاح الاب 330
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٣٣١ رجل تزوج امرأة ثم اقر ان فلانا تزوجها و طلقها و انقضت عدتها ثم تزوجتها 331
و قالت المرأة هو زوجي على حاله لم يطلقني لم يفرق بينهما - فان

حضر الغائب و انكر الطلاق يقضى له بالمرأة - و يفرق بينها و بين الآخر فان اقر الاول بالنكاح و الطلاق و انقضاء العدة و كذبته المرأة في الطلاق فالطلاق واقع - و عليها العدة - كانه طلقها للحال - و يفرق بينها و بين الآخر و ان صدقته المرأة في ذلك كانت المرأة للآخر - و ان انكرت ما اقر به الاول من النكاح و الطلاق كانت المرأة للآخر *

٣٣٢ و لو تزوج امرأة ثم قال كان لها زوج قبلي طلقها و انقضت عدتها و قالت المرأة لم يطلقني و انا امرأته و قال زوجها الاول طلقتك و انقضت عدتك كان القول قوله * 332

٣٣٣ اذا تزوج الرجل امرأة فقالت المرأة تزوجتني بغير شهود او في العدة او كنت امة فتزوجتني بغير اذن المولى او تزوجتني حال ما كنت مجوسية و انكر الزوج ذلك و ادعى النكاح الجائز كان القول قول الزوج و لو ادعى الزوج فساد النكاح بشيء مما ذكرنا فانكرت المرأة و ادعت الصحة فرق بينهما - و لها عليه نصف المهر ان كان لم يدخل بها - و الكل ان دخل بها * 333

٣٣٤ رجل اقر ان هذه المرأة امه او اخته من الرضاع او بنته ثم اراد ان يتزوجها و قال اوهمت او اخطأت او نسيت و صدقته المرأة فيما ادعى من النسيان و الغلط كان له ان يتزوجها - و ان ثبت الرجل على اقراره و قال هو حق كما قلت لم يكن له ان يتزوجها · و ان كان اقراره بذلك بعد ما تزوجها فرق بينهما ان ثبت على اقراره - و كذا لو اقرت المرأة بذلك و انكر الزوج ثم اكذبت المرأة نفسها و قالت اخطأت او غلطت فتزوجها جاز النكاح و ان كان اقرارها بذلك بعد النكاح بقيا على النكاح * 334

٣٣٥ و لو تزوج امرأة ثم قال بعد ذلك هي اختي او ابنتي او امي من 335

الرضاع ثم قال اوهمت ليس الامر كما قلت لا يفسد النكاح بينهما و لو ثبت على اقراره و قال هو حق كما قلت او اشهد عليه شهودا فرق بينهما - فان جحد بعد ذلك لا ينفعه جحوده - و كذا لو قال هذه ابنتي او اختي و لها نسب معروف ثم قال اوهمت صدق *

٣٣٦ و لو قال لعبده او لامته هذا ابني او ابنتي يعتق - و لا يشترط الثبات 336
على اقراره - و كذا[٢] لو قال لامرأته هي ابنتي من النسب و لها نسب معروف لا يفرق بينهما و ان كان مثلها يولد لمثله - و كذا لو قال هي امي و له ام معروفة - و لو قال لها هي ابنتي و ليس لها نسب معروف و مثلها يولد لمثله و ثبت على اقراره فرق بينهما - و ان اقرت المرأة انها ابنته ثبت النسب ان كان مثلها يولد لمثله - و ان كان مثلها لا يولد لمثله لا يثبت النسب و لا يفرق بينهما *

٣٣٧ و ملك اليمين يمنع انعقاد نكاح المولى - اذا تزوج الرجل امته او مكاتبته 337
او مدبرته او ام ولده او امة يملك بعضها لم يكن ذلك نكاحا - و لو تزوج امة الغير ثم ملكها او ملك بعضها بطل النكاح - و الماذون و المدبر اذا اشتريا منكوحتهما لا يبطل النكاح - و كذا المكاتب اذا اشترى منكوحته لا يفسد النكاح - و لو اشترى المكاتب امة فتزوجها لا يصح - و لو اشترى الحر امرأته بشرط الخيار لا يبطل نكاحه في قول ابي حنيفة رحمه الله تعالى - و كذا المرأة اذا زوجت نفسها من عبدها او المكاتب اذا تزوج مولاته لا يصح - فان وطئها كان عليه العقر - و كذا الرجل اذا نكح مكاتبته لا يصح - فان وطئها كان عليه العقر - لان النكاح اذا لم يعتبر كان بمنزلة العدم و لو عتق المكاتب بعد ما تزوج مولاته لا ينقلب النكاح جائزا - و

(٢ ن) و لو قال لامرأته *

لو تزوج المكاتب ابنة المولى برضا المولى جاز - فان مات المولى لا يبطل النكاح - بعد ذلك ان عتق المكاتب يتقرر النكاح - و ان عجز و رُدَّ في الرق يبطل نكاح البنت - و يسقط كل المهر ان كان قبل الدخول و ان كان بعد الدخول فبقدر حصتها من رقبة الزوج يسقط المهر - و يبقى حصة غيرها من الورثة - ولو تزوج المكاتب ابنة المولى بعد موت المولى لا ينعقد *

٣٣٨ و اذا تزوج الرجل بجارية ولده جاز عندنا - فان ولدت منه اولادا عتقوا 338 على المولى - لان الولد يتبع الام في الرق - فاذا ملك المولى اخاه يعتق - و لا تصير الجارية ام الولد للاب عندنا خلافا لزفر رحمه الله تعالى و كذا لو ولدت منه اولادا بنكاح فاسد او بالوطئ عن شبهة - و لو ولدت منه بفجور تصير الجارية ام ولد له *

٣٣٩ و لو تزوج الابن جارية ابيه باذن الاب جاز النكاح - فان ولدت منه ولدا 339 كان الولد حرا - لان المولى ملك ابن ابنه - و لا تصير الجارية ام الولد للابن لعدم الملك - و لو كان الابن وطئها بغير نكاح او شبهة نكاح لايثبت النسب منه و ان ادعى الولد - فان صدقه الاب في انه وطئها و ان الولد منه عتق على الاب باقراره - لانه لو ملك ابنه من الزنا يعتق عليه فكذا اذا ملك ابن ابنه من الزنا - فان قال الابن علمت انها لاتحل لي كان عليه الحد - و ان قال ظننت انها تحل لايحد *

٣٤٠ صغير و صغيرة بينهما شبهة الرضاع لايعلم ذلك حقيقة قالوا لاباس بالنكاح 340 بينهما - هذا اذا لم يخبر بذلك انسان - فان اخبر بذلك عدل ثقة يوخذ بقوله فلا يجوز النكاح بينهما - و ان كان الخبر بعد النكاح و هما كبيران فالاحوط ان يفارقها - روي عن رسول الله صلى الله عليه و سلم انه يأمر بالمفارقة *

٣٤١ صبية ارضعها قوم كثير من اهل قرية اقلهم او اكثرهم و لايدري من ارضعها 341
اراد واحد من تلك القرية ان يتزوجها قال ابوالقاسم الصفار رحمه الله تعالى اذا لم يظهر له علامة و لم يشهد له بذلك كان في سعة من نكاحها *

فصل في مسائل النسب

٣٤٢ رجل تزوج امرأة نكاحا فاسدا فدخل بها فجاءت بولد لستة اشهر ثبت 342
النسب منه - و اختلفوا في اعتبار هذا الوقت انه يعتبر ستة اشهر من وقت النكاح او من وقت الدخول - قال ابوحنيفة و ابو يوسف رحمهما الله تعالى يعتبر من وقت النكاح - و قال محمد رحمه الله تعالى يعتبر ستة اشهر من وقت الدخول - و عليه الفتوى - و في النكاح الصحيح اجمعوا على انه يعتبر المدة من وقت النكاح - و قال بعضهم لايشترط الدخول في النكاح الصحيح - لكن لابد من الخلوة *

٣٤٣ رجل زنى بامرأة فحبلت منه فلما استبان حملها تزوجها الزاني و 343
لم يطأها حتى ولدت قالوا ان لم تكن في عدة الغير جاز النكاح - و عليهما التوبة - و قال الفقيه ابوالليث رحمه الله تعالى ان جاءت بولد لستة اشهر فصاعدا من وقت النكاح جاز النكاح - و يثبت النسب - و ان جاءت بولد لاقل من ستة اشهر من وقت النكاح لا يثبت النسب ولا يرث منه الا ان يقول الرجل هذا الولد مني و لا يقول من الزنا *

٣٤٤ رجل اتهم بامرأة ظهر بها حبل فزوجها ابوها منه و الزوج ينكر ان يكون 344
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٣٤٥ رجل تزوج امرأة فجاءت بسقط استبان خلقه او بعض خلقه قالوا ان جاءت لاربعة اشهر جاز النكاح - و ان جاءت لاربعة اشهر الا يوما لايجوز لان الخلق لايستبين في اقل من مائة و عشرين يوما - فاذا اسقطت سقطا استبان خلقه كان السقط من زوج كان قبله - فلا يجوز النكاح - و ان ولدت ولدا تاما ان ولدت لستة اشهر من وقت النكاح يثبت النسب منه و يجوز نكاحه - و ان ولدت لاقل من ذلك لا يجوز نكاحه * 345

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٣٤٨ و لا يجوز للمزوج دفع الزكوة الى ولد الملاعنة - و لا يقبل شهادته له - و ذكر هشام رحمه الله تعالى في النوادر انه يجوز شهادة ولد الملاعنة للمزوج * 348

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(٢ ن) و يجوز للاول دفع الزكوة الى الاولاد * (٣ ن) فقالت المرأة *

٣٥٠ عبد تزوج امة باذن مولاهما[٢] ثم اشتراهما رجل فادعى المشتري انهما 350
ولداه و مثلهما يولد لمثله فهما ولداه - و يفسد النكاح بينهما و ان
انكرا ذلک *

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رجل و اقام بينة انها امرأته زوجها منه مولاها قال اجعلها امرأته - و
اجعل الولد ولد الزوج - لانه صاحب فراش - و يعتق الولد على
المولى لدعواه انه ولده *

٣٥٢ رجل تزوج امرأة فجاءت بولد تام لاقل من ستة اشهر قال محمد 352
رحمه الله تعالى النكاح فاسد في قولي و في قول[٣] ابي يوسف رح *

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رحمه الله تعالى الولد ولده - و يجعلها ذلک لزوج كان قبله طلقها ثلثا *

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٤٣٤ و لو تزوج امرأة و لم يسم لها مهرا او كفل رجل بمهر المثل جازت الكفالة كما يجوز الكفالة بالمسمى - فان دخل بها الزوج يؤخذ الكفيل بمهر المثل و ان طلقها قبل الدخول بها و وجب المتعة لا يؤخذ الكفيل بالمتعة * 434

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بالرهن وفاء بالمهر - و ان هلك الرهن بعد ما طلقها قبل الدخول
عندنا تصير مستوفية نصف المهر - و يهلك النصف الباقي امانة - كما
لو وهب المرتهن الدين من الراهن ثم هلك الرهن عندنا يهلك امانة
و عند زفر رح يهلك مضمونا بالدين - هذا اذا كان رهنا بالمسمى - و
ان كان رهنا بمهر المثل و هلك ثم طلقها قبل الدخول بها كان على
المرأة قيمة الرهن يسقط عنها قدر المتعة - و ان هلك بعد الطلاق ان هلك
قبل ان تحدث المرأة حبسا بالمتعة قال ابو يوسف رح آخرا يهلك
امانة - و لها المتعة على الزوج - و قال ابو يوسف رح اولا و هو قول
محمد رحمه الله يهلك بالمتعة - ولا يرجع احدهما على صاحبه بشيئ
و ان احدثت حبسا بالمتعة بعد الطلاق ثم هلك الرهن قال ابو يوسف
رح آخرا هلك بمهر المثل - فيلزمها رد مهر المثل ينقص عنه المتعة - و
قال محمد و هو قول ابي يوسف رح الاول يهلك بالمتعة - و لا يرجع
احدهما على صاحبه بشيئ *

٤٣٦ اذا وقعت الفرقة بين الزوجين قبل الدخول بها بفعل من قبل المرأة 436
كالردة و تقبيل ابن الزوج و خيار البلوغ من (قبل الغلام او) المرأة و خيار
العتق اذا كانت المرأة امة او مكاتبة زوجها مولاها باذنها و هي صغيرة
او كبيرة ثم عتقت و اختارت نفسها يسقط كل المهر و لا يجب شيئ *

٤٣٧ و كذا لو كانت امة فقتلها مولاها قبل الدخول بها عمدا او خطأ يسقط 437
كل المهر في قول ابي حنيفة رحمه الله تعالى - و قال صاحباه لا يسقط
شيئ و لها كل المهر - و لو قتلت الامة نفسها عن ابي حنيفة رحمه الله
تعالى فيه روايتان - و الصحيح انه لا يسقط - و لو آبقت في قياس قول
ابي حنيفة رحمه الله تعالى و هو قول ابي يوسف رح لا صداق لها ما

لم تحضر - و لو قتلت الحرة نفسها لا يسقط شيئ من المهر عندنا
خلافا للشافعي رحمه الله تعالى *

٤٣٨ والمجوسية اذا كانت في نكاح مجوسي فاسلم الزوج و ابت المرأة 438
الاسلام يفرق بينهما و يسقط كل المهر *

فصل في حبس المرأة نفسها بالمهر

٤٣٩ اذا زوجت المرأة و لها مهر معلوم كان لها ان تحبس نفسها لاستيفاء 439
المهر - فان كان في موضع يعجل البعض و يترك الباقي في الذمة الى
وقت الطلاق او الموت كما هو عرف ديارنا كان لها ان تحبس نفسها
لاستيفاء المعجل - و هو الذي يقال بالفارسية دست پيمان - و ليس لها
ان تطالبه بكل المهر - فان بينوا قدر المعجل يعجل ذلك - و ان لم يبينوا
شيئا ينظر الى المرأة و الى المهر المذكور في العقد انه كم يكون المعجل
لمثل هذه المرأة من مثل هذا المهر فيجعل ذلك معجلا - و لا يقدر
ذلك بالربع و لا بالخمس - و انما ينظر الى المتعارف - لان الثابت عرفا
كالثابت شرطا - و ان شرطوا في العقد تعجيل كل المهر يجعل الكل
معجلا و يترك العرف - و ان كان البعض معجلا و اداه كان له ان يدخل
بها - لان الدخول بعد اداء المعجل مشروط عرفا فيعتبر بما لو كان مشروطا
نصا - و ان[٢] كان كل المهر مؤجلا و شرط الدخول قبل اداء شيئ كان له
ان يدخل بها كما قال ابو حنيفة و محمد رحمهما الله تعالى - فان لم يدخل
بها حتى حل الاجل كان له ان يدخل بها قبل اعطاء المهر *

٤٤٠ و لو تزوج امرأة بمهر معجل كان لها ان تخرج في حوائجها بغير اذن 440

(٢ ن) و لو كان *

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٤٤١ صغيرة تزوجت فذهبت الي زوجها قبل قبض الصداق كان لمن له حق 441
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٤٤٢ اذا اراد الرجل ان ينقل المرأة من بلد الي بلد بغير اذنها ان كان 442
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٤٤٣ رجل زوج ابنته الصغيرة كان له ان يطالب الزوج بالمهر - و ليس له ان يطالبه 443
بالنفقة اذا كانت لا تطيق الرجال و لا تحتمل الجماع - لان النفقة جزاء الاحتباس لحق الزوج - و الصغيرة التي هذه حالها لم تكن محبوسة لحق الزوج - اما المهر بدل البضع - و قد ملك بضعها فيطالب به *

(٢ ن) تسليمها *

٣١٨ و لا يجوز نكاح منكوحة الغير و معتدة الغير عند الكل - و لو تزوج بمنكوحة 318
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٣١٩ و المهاجرة لا عدة عليها - و لها ان تتزوج للحال في قول ابي حنيفة رحمه الله 319
تعالى - و قال صاحباه رحمهما الله تعالى عليها العدة - و لا يجوز نكاحها
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و ان كانت المهاجرة حاملا لا تتزوج في رواية محمد عن ابي حنيفة
رحمهما الله تعالى - و روى ابو يوسف عن ابي حنيفة رحمهما الله تعالى
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٣٢٠ و يجوز نكاح الحامل من الزنا - و لا يقربها زوجها حتى تلد في قول 320
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٣٢١ و اذا رأى الرجل امرأة تزني فتزوجها جاز النكاح - و للزوج ان يطأها من 321
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٣٢٢ و اذا (٢) تزوج الذمي كافرة معتدة من كافر جاز في قول ابي حنيفة رحمه 322
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ان يتزوجها حتى تنقضي عدتها *

(٢ ن) و ان تزوج *

٣٢٣ و الذمي اذا ابان امرأته الذمية فتزوجها مسلم او ذمي من ساعته 323
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٣٢٤ رجل وطئ امرأة ابيه حرمت على ابيه - و كان على الاب كل المهر 324
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٣٢٥ و ان قبل امرأة ابيه عن شهوة حرمت على ابيه - و يجب المهر على 325
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٣٢٦ و لا يحل للرجل ان يتزوج حرة طلقها ثلاثا قبل اصابة الزوج الثاني 326
و لا امة طلقها ثنتين - و كما لا يجوز له نكاحها لا يحل له وطئها بملك اليمين *

فصل في اقرار احد الزوجين بالحرمة - و فساد النكاح بسبب النسب و بطلان النكاح بملك اليمين *

۳۲۷ المطلقة الثلث اذا اتت الزوج الاول و قالت تزوجت بزوج آخر و دخل 327
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و كان ذلك بعد مدة تنقضي فيها العدتان و ذلك اربعة اشهر فصاعدا حل
للزوج الاول ان يتزوجها - و ان كان بعد مدة لا ينقضي فيها العدتان
لا يحل - و كذا لو اقرت المرأة بذلك و انكر الزوج الثاني حل نكاحها للاول
و لو اقر الزوج الثاني بذلك و انكرت المرأة دخول الثاني لا يحل للاول
و ان كان الاول تزوجها بعد مدة و لم تقل المرأة شيئا ثم قالت تزوجتني
و كنت في عدة الثاني او قالت كنت تزوجت بالزوج الثاني و لم
يدخل بي قالوا ان كانت عالمة بشرائط الحل للاول لا يقبل قولها - و
للاول ان يمسكها - و ان كانت جاهلة قبل قولها *

۳۲۸ و كذا الرجل اذا تزوج امرأة كانت منكوحة الغير قد طلقها فقالت المرأة 328
للثاني تزوجتني و انا معتدة عن الاول قال الشيخ الامام ابو بكر محمد
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قولها في قول ابي حنيفة و ابي يوسف رحمهما الله تعالى - و يكون
اقدامها على النكاح اقرارا منها بانقضاء العدة - و ان كان بين طلاق الاول
و نكاح الثاني اقل من شهرين كان القول قولها - و يفرق بينها و بين الثاني
و هذا بخلاف ما اذا طلق الرجل امرأته ثلاثا ثم تزوجها بعد مدة
فقالت تزوجتني قبل ان اتزوج بزوج آخر كان القول قولها - و لا يكون
اقدامها على نكاح الاول اقرارا منها على انها تزوجت بزوج آخر - لان

انقضاء العدة لا يعرف الا بقولها - فجعل اقدامها على النكاح بمنزلة اقرارها بانقضاء العدة - و لا كذلك النكاح - لان الوقوف على نكاح الثاني ممكن - فلم يجعل اقدامها اقرارا منها بوجود النكاح - فان كان الزوج الاول تزوجها بعد شهور ثم قال لها تزوجتك قبل اصابة الزوج الثاني او تزوجتك قبل نكاح الثاني و قالت المرأة لا بل كان بعد ذلك كان القول قول المرأة - و يفسد النكاح باقرار الزوج - و لها عليه نصف المسمى ان كان لم يدخل بها - و الكل ان كان دخل بها *

٣٢٩ اذا تزوج الرجل امرأة قد كان لها زوج طلقها فقال الزوج الثاني تزوجتك 329
قبل انقضاء العدة و قالت المرأة قد كنت اسقطت بعد الطلاق سقطا استبان خلقه كان القول قول الزوج و يفرق بينهما - و لو قالت المرأة بعد النكاح قد كنت اسقطت قبل نكاحك بعد طلاق الاول سقطا استبان خلقه و قال الزوج تزوجتك قبل انقضاء العدة كان القول قولها - و يفرق بينهما - و لها عليه المهر ان كان دخل بها - و نصف المهر ان لم يدخل بها و في الوجه الاول يفرق بينهما - و لا مهر على الزوج ان لم يكن دخل بها *

٣٣٠ امرأة زوجت بزوج و دخل بها ثم قالت لم اكن رضيت بنكاح الاب 330
و قد رددت نكاح الاب حين علمت و اقامت البينة على ذلك قال الشيخ الامام ابو بكر محمد بن الفضل رحمه الله تعالى يقبل بينتها على رد النكاح - و قال القاضي الامام ابو علي النسفي رحمه الله تعالى لا يقبل بينتها - لان التمكين بمنزلة الاقرار على جواز النكاح - فكانت مكذبة ظاهرا *

٣٣١ رجل تزوج امرأة ثم اقر ان فلانا تزوجها و طلقها و انقضت عدتها ثم تزوجتها 331
و قالت المرأة هو زوجي على حاله لم يطلقني لم يفرق بينهما - فان

حضر الغائب و انكر الطلاق يقضى له بالمرأة - و يفرق بينها و بين الآخر فان اقر الاول بالنكاح و الطلاق و انقضاء العدة و كذبته المرأة في الطلاق فالطلاق واقع - و عليها العدة - كانه طلقها للحال - و يفرق بينها و بين الآخر و ان صدقته المرأة في ذلک كانت المرأة للآخر - و ان انكرت ما اقر به الاول من النكاح و الطلاق كانت المرأة للآخر *

٣٣٢ و لو تزوج امرأة ثم قال كان لها زوج قبلي طلقها و انقضت عدتها و قالت 332
المرأة لم يطلقني و انا امرأته و قال زوجها الاول طلقتک و انقضت عدتک كان القول قوله *

٣٣٣ اذا تزوج الرجل امرأة فقالت المرأة تزوجتني بغير شهود او في العدة 333
او كنت امة فتزوجتني بغير اذن المولى او تزوجتني حال ما كنت مجوسية و انكر الزوج ذلک و ادعى النكاح الجائز كان القول قول الزوج و لو ادعى الزوج فساد النكاح بشيء مما ذكرنا فانكرت المرأة و ادعت الصحة فرق بينهما - و لها عليه نصف المهر ان كان لم يدخل بها - و الكل ان دخل بها *

٣٣٤ رجل اقر ان هذه المرأة امه او اخته من الرضاع او بنته ثم اراد ان يتزوجها 334
و قال اوهمت او اخطأت او نسيت و صدقته المرأة فيما ادعى من النسيان و الغلط كان له ان يتزوجها - و ان ثبت الرجل على اقراره و قال هو حق كما قلت لم يكن له ان يتزوجها ٠ و ان كان اقراره بذلک بعد ما تزوجها فرق بينهما ان ثبت على اقراره - و كذا لو اقرت المرأة بذلک و انكر الزوج ثم اكذبت المرأة نفسها و قالت اخطأت او غلطت فتزوجها جاز النكاح و ان كان اقرارها بذلک بعد النكاح بقيا على النكاح *

٣٣٥ و لو تزوج امرأة ثم قال بعد ذلک هي اختي او ابنتي او امي من 335

الرضاع ثم قال اوهمت ليس الامر كما قلت لا يفسد النكاح بينهما و لو ثبت على اقراره و قال هو حق كما قلت او اشهد عليه شهودا فرق بينهما - فان جحد بعد ذلك لا ينفعه جحوده - و كذا لو قال هذه ابنتي او اختي و لها نسب معروف ثم قال اوهمت صدق *

٣٣٦ و لو قال لعبده او لامته هذا ابني او ابنتي يعتق - و لا يشترط الثبات على اقراره - و كذا (٢) لو قال لامرأته هي ابنتي من النسب و لها نسب معروف لا يفرق بينهما و ان كان مثلها يولد لمثله - و كذا لو قال هي امي و له ام معروفة - و لو قال لها هي ابنتي و ليس لها نسب معروف و مثلها يولد لمثله و ثبت على اقراره فرق بينهما - و ان اقرت المرأة انها ابنته ثبت النسب ان كان مثلها يولد لمثله - و ان كان مثلها لا يولد لمثله لا يثبت النسب و لا يفرق بينهما * 336

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(٢ ن) و لو قال لامرأته *

او تزوج المكاتب ابنة المولى برضا المولى جاز - فان مات المولى لا يبطل النكاح - بعد ذلك ان عتق المكاتب يتقرر النكاح - و ان عجز و رُدَّ في الرق يبطل نكاح البنت - و يسقط كل المهر ان كان قبل الدخول و ان كان بعد الدخول فبقدر حصتها من رقبة الزوج يسقط المهر - و يبقى حصة غيرها من الورثة - ولو تزوج المكاتب ابنة المولى بعد موت المولى لا ينعقد *

٣٣٨ و اذا تزوج الرجل بجارية والده جاز عندنا - فان ولدت منه اولادا عتقوا على المولى - لان الولد يتبع الام في الرق - فاذا ملك المولى اخاه يعتق - و لا تصير الجارية ام الولد للابن عندنا خلافا لزفر رحمه الله تعالى و كذا لو ولدت منه اولادا بنكاح فاسد او بالوطي عن شبهة - و لو ولدت منه بفجور تصير الجارية ام ولد له * 338

٣٣٩ و لو تزوج الابن جارية ابيه باذن الاب جاز النكاح - فان ولدت منه ولدا كان الولد حرا - لان المولى ملك ابن ابنه - و لا تصير الجارية ام الولد للابن لعدم الملك - و لو كان الابن وطئها بغير نكاح او شبهة نكاح لايثبت النسب منه و ان ادعى الولد - فان صدقه الاب في انه وطئها و ان الولد منه عتق على الاب باقراره - لانه لو ملك ابنه من الزنا يعتق عليه فكذا اذا ملك ابن ابنه من الزنا - فان قال الابن علمت انها لاتحل لي كان عليه الحد - و ان قال ظننت انها تحل لايحد * 339

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فصل في مسائل النسب

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الدفع اليها كالدفع الى اجنبي - و كذا الجواب فيما سوى الاب و الجد اب
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لا يملك قبض صداقها و ان كان عاقدا بحكم الولاية و الوكالة *

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و كان للزوج ان يأخذ ذلك من الاب - و ان كانت المرأة بالغة ثيبا او
كانت بكرا و كان الزوج جاحدا لم يكن للاب ان يخاصم الزوج الا بوكالتها - فان
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و قال الاب لا بل هي بكر في منزلي و لا بينة للزوج و طلب من القاضي
تحليف الاب على العلم بذلك عن ابي يوسف رحمه الله تعالى انه
يحلف - لان الاب لو اقر بذلك صح اقراره على نفسه و يبطل خصومته فيحلف
و ذكر الخصاف في ادب القاضي انه لا يحلف لانه لا يدعي على الاب
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قد ابرأني عن الدين او قد اوفيته و اراد ان يحلف الوكيل ليس له
ذلك - فان قال الزوج انه يأخذ الصداق و لا يسلم البنت فان تصادقا ان

البنت صغيرة ولا تحتمل الجماع أمر الزوج بدفع الصداق الى الاب - و لا يلتفت الى كلام الزوج - و ان قال الاب هي كبيرة لا اعرف مكانها و لا اقدر على تسليمها و مع ذلک يريد اخذ الصداق من الزوج ليس له ذلک و ان قال الاب هي كبيرة في منزلي انا آخذ صداقها و اجهزها به و الزوج يطلب تسليم المرأة فان القاضي يأمر الزوج بدفع الصداق الى الاب - لان العادة جرت بتعجيل الصداق و تاخير تسليم المرأة - و الثابت عرفا كالثابت شرطا - الا انه يأخذ من الاب كفيلا بالمهر حتى لو سلم البنت اليه برئ الكفيل - و ان عجز عن تسليم البنت يتوسل الزوج الى حقه باخذ المال من الكفيل - لان الاب اذا كان عاجزا عن تسليم البنت لا يكون له حق قبض الصداق اذا كانت كبيرة - و ان كانت الخصومة بين الاب و الزوج في مصر و الزوجة(٢) في مصر آخر كان عقد النكاح ثمه او كان عقد النكاح في المصر الذي اختصما ثم انتقلت المرأة الى مصر آخر بان كانت الخصومة بينهما بالكوفة و المرأة بالبصرة فقال الاب انا آخذ الصداق ههنا و اسلمها اليه بالبصرة فان القاضي يأمر الزوج حتى يدفع الصداق الى الاب ثم يذهب الى البصرة فيأخذها ثمه - و لا يجب على الاب حمل المرأة الى زوجها *

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(٢ ن) و المرأة * (٣ ن) شرى الضيعة *

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٥٠٦ و ان اختلفا في اصل التسمية احدهما يدعي تسمية المهر و الآخر ينكر 506
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(٢ ن) و في جواب كتاب النكاح و الجامع الصغير القول الخ * (٣ ن) و يختلف *
(٤ ن) الزوج *

بشیئ في قول ابي حنيفة رحمه الله تعالى - و قالا رح يقضى بمهر المثل - و قالوا و الفتوى على قولهما *

۵۰۸ و لو تزوجها على عبد بعينه و هلک العبد قبل التسليم اليها و اختلفا في قيمته كان القول للزوج - و كذا لو تزوجها على ثوب بعينه فهلک الثوب قبل التسليم و اختلفا في قيمة الثوب كان القول قول الزوج - و كذا لو تزوجها على ابريق فضة او ذهب فهلک قبل التسليم و اختلفا في وزنه كان القول قول الزوج في هذه المسائل * 508

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(۲ ن) فازداد *

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الغزل لها - و عليها مثل ذلك القطن - لان الظاهر من حاله انه كان يشتري القطن لاجل البيع - و ان لم يكن يبيع القطن ان كان الزوج يدعي الاذن كان القول قوله - لان الظاهر من حاله انه يحمل القطن الى بيته لتغزل المرأة - فكان الاذن ثابتا دلالة - كما لو طبخت طعاما من اللحم الذي جاء به فان الطعام يكون للزوج - و لان الزوج اذا كان يدعي الاذن و المرأة (٢) تدعي عليه تملك القطن و هو منكر (٣) - و كذا لو اختلفا في الكرباس فقال الزوج للمرأة دفعت الى الحائك باذني لينسجه و قالت دفعت بغير اذنك كان القول قول الزوج - اذا غزلت المرأة قطن زوجها باذنه و كانا يبيعان من ذلك الكرباس و يشتريان بالثمن امتعة لحاجتهما و اتخذا ببعض الكرباس ثياب البيت فجميع (٤) ما اتخذ من ذلك الكرباس و ما اشترى من ثمنه للرجل - لان المرأة تعمل للرجل فيكون ذلك للرجل الا شيئا اشترى لها و سمى عند الشراء او علم عادة انه اشترى لها و دفع اليها فيكون لها - رجل كان يدفع الى امرأته ما يحتاج اليه و كان يدفع اليها احيانا من الدراهم و يقول اشتري بها قطنا و اغزلي فكانت تشتري او تغزل ثم تبيع و تشتري بها امتعة (٥) للبيت كانت الامتعة للمرأة - لانها اشترت من غير توكيل الزوج اياها بالشراء فكانت مشترية لنفسها - و الله اعلم *

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بزوجة لي و ان هي زوجة لي فهي طالق بائن - اما الاستحلاف فلان
علي قول ابي يوسف و محمد رحمهما الله تعالى يستحلف(٢) على النكاح
و الفتوى على قولهما - و اجمعوا على انه يستحلف على النكاح بعد
الطلاق البائن و الموت لاجل المال - و انما يستحلف على هذا الوجه لانها
لو كانت صادقة لا يبطل النكاح بجحوده فاذا حلف تبقى معطلة - و قال
بعضهم يستحلف على النكاح فاذا حلف يقول القاضي فرقت بينكما *

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الثاني - فلا يستحلف لكن يحلف الزوج الثاني - فان حلف انقطعت
الخصومة - و ان نكل الزوج الثاني صار مقرا بنكاح الاول - فح يستحلف
المرأة - فان حلفت لا يثبت نكاح الاول - و ان نكلت يقضي بها للاول *

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حالة الحيوة لا يحتمل الشركة و ليس احدهما اولى من الآخر - و ان اقام
كل واحد منهما البينة انها له و كانت المرأة في يد احدهما يقضى بها
لصاحب اليد - و كذا لو اقاما البينة و ادعى احدهما الدخول و شهد
شهوده بالنكاح و الدخول يقضى له - و ان اقام كل واحد منهما البينة
على النكاح و الدخول لا يقضى لاحدهما - و ان ادعيا النكاح و وقّت
احدهما و شهد شهوده على النكاح و الوقت فهو اولى - و ان وقت
احدهما و لم يوقت الآخر الا ان المرأة في يد الذي لم يوقت يقضى

(٢ ن) يستحلف في النكاح * (٣ ن) فجحدت *

لذي اليد - و كذا لو وقت احدهما و لم يوقت الآخر الا ان الذي لم يوقت اقام البينة على النكاح و الدخول كان هو اولي - و ان وقتا و احدهما اسبق فالاسبق اولي علي كل حال - و ان اقاما البينة على النكاح و لم يوقتا فاقرت هي لاحدهما يقضي للمقر له - و ان اقاما البينة علي النكاح و المرأة تقر لاحدهما اختلفوا فيه - قال بعضهم لا يقضي للمقر له - لان الاقرار قبل البينة يبطل بينة الآخر فلا يقضي الا بالاقرار بعد البينة - و قال بعضهم يقضي للمقر له - لان اقرار المرأة لاحدهما بمنزلة اليد و لو اقاما البينة و هي في يد احدهما يقضي لصاحب اليد - و لو كانت المرأة في يد احدهما فشهد شهوده انها امرأته او شهدوا انها منكوحته و حلاله و شهود الآخر شهدوا انه تزوجها اختلفوا فيه - قال بعضهم لا يقبل بينة ذي اليد - لان بينة ذي اليد انما تترجح علي بينة الخارج اذا شهدوا علي السبب - اما اذا شهدوا علي هذا الوجه كان هذا بمنزلة الشهادة علي مطلق الملك فلا يقبل بينة ذي اليد - و قال بعضهم تقبل لان شهادة الشهود انها امرأته او منكوحته و حلاله بمنزلة الشهادة علي السبب - لان المرأة لا تصير منكوحة و حلالة الا بسبب معين و هو النكاح و الحكم اذا تعلق بسبب معين كان ذكر الحكم و ذكر السبب سواء - بخلاف الملك لان الملك يثبت باسباب كثيرة و ليس بعضها باولي من البعض فلا يتعين السبب *

٥٣٢ رجل ادعي نكاح امرأة و هي تجحد فشهد الشهود انها امرأته و قضي القاضي بها ثم جاء آخر و اقام البينة علي مثل ذلك لا يلتفت الي الثاني - لان القضاء صح ظاهرا فلايبطل ما لم يظهر خطاءه بيقين - و ذلك بان يوقت الثاني وقتا يكون قبل الاول * 532

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ما تزوجت عمرا فان القاضي يقضي بها لعمرو - و قال استحسن ذلك
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۵۴۰ و لو مات احد المدعيين فاقرت المرأة ان نكاح الميت كان اولا صح 540
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۵۴۱ رجل ادعى على امرأة انها امرأته و اقام البينة على ذلك و ادعت 541

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(۲ ن) او کذبته * (۳ ن) الحاضرة *

الشاهدة البينة على اقرار المدعي بنكاح الغائبة - و قال ابو يوسف و محمد رحمهما الله تعالى يتوقف القاضي و لا يقضي بنكاح الشاهدة - فان حضرت الغائبة و اقامت البينة على ما ادعت اختها يقضي بنكاحها اذا اقامت هي البينة - و لا يقضي بنكاحها بتلك البينة التي اقامت الشاهدة - و يفرق بين الزوج و الشاهدة - فان انكرت الغائبة نكاحها يقضي بنكاح الشاهدة - و لو اقر الرجل(٢) بنكاح الغائبة يسأله القاضي هل كان بينك و بين الغائبة فرقة - فان قال لا يبطل نكاح الحاضرة - و لو قال كنت طلقت الغائبة و اخبرتني بانقضاء عدتها و كذبته الشاهدة في طلاق الغائبة يقضي بنكاح الشاهدة - فان حضرت الغائبة و صدقته في النكاح وكذبته في الطلاق يقع الطلاق عليها من حين اقرار الزوج بطلاقها *

٥٤٦ و لو ادعى نكاح امرأة و اقام البينة و ادعت المرأة انه تزوج بامها او ابنتها فهذا و ما لو ادعت نكاح الاخت سواء في قول ابي حنيفة رحمه الله تعالى - و لو اقامت الشاهدة البينة انه تزوج بامها و دخل بها او قبلها او مسها عن شهوة او نظر الى فرجها عن شهوة فرق القاضي بين الشاهدة و بين المدعي - و لا يقضي بنكاح الغائبة * 546

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القول قول الزوج - و لا يقبل قول المرأة - فان حضر رجل و ادعى انه الزوج
الذي اقر به الزوج الثاني و صدقته المرأة في ذلک و كذبه الزوج الثاني
كان القول قول الزوج الثاني - لانه ما اقر بالنكاح المعلوم ههنا - و الله اعلم *

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٥٥٣ و لو رآی رجلا و امرأة يسكنان في منزل و ينبسط كل واحد منهما علی صاحبه كما يكون بين الازواج حل له ان يشهد علی نكاحهما * 553

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فصل في العنين

٥٥٨ نكاح العنين جائز - فان علمت المرأة وقت النكاح انه عنين لا يصل الى النساء لا يكون لها حق الخصومة - كما لو علم المشتري بالعيب وقت البيع و ان لم تعلم وقت النكاح و علمت بعد ذلك كان لها حق الخصومة ولا يبطل حقها بترك الخصومة و ان طال الزمان مالم ترض بذلك * 558

٥٥٩ و كذا لو كان الرجل يصل الى غيرها من النساء و الجواري و لا يصل اليها كان لها حق الخصومة * 559

٥٦٠ و اذا خاصمته الى القاضي فان القاضي يسأل الزوج فان قال قد وصلت اليها في هذا النكاح و انكرت المرأة ان كانت ثيبا كان القول قوله - و ان قالت انا بكر فالقاضي يريها النساء - و المرأة الواحدة تكفي - و الثنتان احوط - فان قلن هي ثيب كان القول قول الزوج - و ان قلن هي بكر 560

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كان القول قولها في عدم الوصول اليها - و ان شهد البعض بالبكارة و البعض بالثيابة يريها غيرهن - فاذا ثبت عدم الوصول اليها اجله القاضي سنة طلب الرجل التاجيل او لم يطلب - و يشهد على التاجيل و يكتب لذلك تاريخا - و كذلك لو اقر الزوج انه لم يصل اليها اجله سنة *

۵٦۱ و تكلموا انه يؤجله سنة قمرية او شمسيـــة قال الشيخ الامام المعروف بخواهرزاده رح لم يذكر محمد رح هذا في الكتاب - و روى ابن سماعة عن محمد رح في النوادر انه يؤجله سنة شمسية بالايام - و هكذا قال الشيخ الامام شمس الائمة السرخسي و الناطفي رح رجاء ان يوافقه العلاج في الايام التي يقع التفاوت فيها بين الشمسية و القمرية - و لا يكون هذا التاجيل الا عند قاضي مصر او مدينة - فان اجلته المرأة او اجله غير القاضي لا يعتبر ذلك التاجيل * 561

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۵٦۳ و ان مرض احدهما مرضا شديدا لايستطاع معه الجماع عن ابي يوسف رح فيه روايتان - في رواية يحتسب عليه ما دون السنة و ان كان يوما - و في رواية ما يزاد على نصف الشهر لا يحتسب عليه - و يعوض له لذلك عوضا - و ما دون ذلك يحتسب - و عن محمد رح لا يحتسب الشهر و ما دونه يحتسب - و هو اصح الاقاويل * 563

۵٦۴ و لو هربت المرأة من زوجها لا يحتسب تلك الايام على الزوج و ان غاب الزوج بحج او عمرة يحتسب عليه - و لو حبس الزوج فلم تأته المرأة لا يحتسب على الزوج - و كذا لو حبسته المرأة بمهرها و لم تأته - و ان اتته الى السجن و ثمه مكان يمكنه الخلوة و الجماع يحتسب عليه - و كذا لو حبست المرأة بحق و كان الزوج يصل اليها 564

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الثاني و ينقطع حكم الاول - و في رواية اذا حبلت من الثاني ينقطع
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۶۲۶ رجل زنى بامرأة فولدت منه و ارضعت بهذا اللبن صغيرة لا يجوز لهذا 626
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٦٣٠ و لو تزوج ثلث رضيعات فجاءت امرأة و ارضعتهن على التعاقب او ارضعت ثنتين ثم الثالثة حرمت الاوليان - لانه صار جامعا بين الاختين في نكاح - و بقيت الثالثة امرأته - لانها صارت اختا للاوليين بعد ما فسد نكاح الاوليين - فان ارضعت واحدة منهن اولا ثم الثنتين معا حرمن جميعا - لان الاختية تثبت دفعة واحدة * 630

٦٣١ و لو تزوج صغيرة و كبيرة فارضعت الكبيرة الصغيرة بانتا جميعا - ولا مهر 631

(٢ ن) و كذلک *

للكبيرة ان كان لم يدخل بها - لان الفرقة جاءت من قبلها - و للصغيرة نصف المهر - لانها بانت بفعل الغير - ثم يرجع الزوج بنصف مهر الصغيرة على الكبيرة ان تعمدت الفساد - و ان لم تتعمد لا يرجع - و له ان يتزوج الصغيرة بعد ذلك - لانها صارت ابنة امرأته و لم يدخل بها - و ليس له ان يتزوج الكبيرة على كل حال - لانها ام امرأته - و ان كان دخل بالكبيرة لا يحل له ايضا نكاح الصغيرة *

۶۳۲ و لو تزوج كبيرة و ثلث رضيعات فارضعتهن الكبيرة واحدة بعد واحدة او ارضعت واحدة ثم ثنتين معا حرمن جميعا - اما الكبيرة و الصغيرة الاولى لانهما صارتا اما و بنتا - و اما الباقيتان فلانهما صارتا اختين في نكاح واحد و ان ارضعت ثنتين معا ثم الثالثة حرمت الكبيرة و الاوليان - و لا تحرم الثالثة - لانها صارت ابنة امرأته بعد ما بانت امرأته قبل الدخول * 632

۶۳۳ و ان تزوج صغيرتين و كبيرتين فارضعت الكبيرتان صغيرة ثم صغيرة بانت الكبيرتان والصغيرة الاولى - اما الكبيرة الاولى فلانها بارضاع الاولى صارت ام امرأته فبطل نكاحها و نكاح الصغيرة الاولى - لانهما اجتمعتا في نكاح واحد و اما الكبيرة الثانية فلانها بارضاع الصغيرة الاولى صارت ام امرأة كانت له فبطل نكاحها - و الصغير الثانية امرأته - لانها صارت ابنة المرأة التي بانت منه قبل الدخول و ليس في نكاحه غيرها فلا تحرم * 633

۶۳۴ رجل زوج ام ولده من ابن(۲) صغير له فارضعته من لبن السيد حرمت المرضعة على مولاها و على زوجها الصغير - اما على المولى فلانها صارت منكوحة ابنه فتحرم على المولي - و تحرم على الزوج الصغير - لانها صارت موطوءة الاب - و لانها امه * 634

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* (۲ ن) عبده *

635 ٦٣٥ رجل وطي امرأة بنكاح فاسد ثم تزوج صبية فارضعتها ام الموطوءة بانت الصبية - لانها صارت اخت الموطوءة - و الموطوءة في عدته فيبطل نكاح الصبية *

636 ٦٣٦ رجل تزوج صبية ثم عمتها لا يصح نكاح العمة - فان ارضعت ام العمة الصبية لا تحرم الصبية على زوجها - لان نكاح العمة لم يصح فلا يصير جامعا بين الاختين *

637 ٦٣٧ رجل تزوج رضيعتين فجاءت امرأتان لهما لبن من رجل واحد فارضعت احدي المرأتين رضيعة و ارضعت المرأة الاخرى الرضيعة الثانية بانت الرضيعتان عن زوجهما - لانهما صارتا اختين تحت رجل واحد ففسد نكاحهما - و لا ضمان على المرضعتين و ان تعمدتا الفساد لان المفسد للنكاح الاختية - والاختية حصلت بفعلهما جملة - فلم يكن الفساد حاصلا بفعل احدهما خاصة فلا يجب الضمان - كرجل قال لامرأتين له في مرض موته ان دخلتما الدار فانتما طالقتان ثلثا فدخلتا بانتا و لا تحرمان عن الميراث - لان وقوع الطلاق حصل بصنعهما جملة لا بفعل احدهما - و لو كانت الكبيرتان لهما لبن من زوج الرضيعتين و المسئلة بحالها ذكر في بعض المواضع انه لا يجب الضمان على الكبيرتين - لان فساد النكاح لا يضاف الى احدهما خاصة - و كان هذا الجواب وقع سهوا لان سبب فساد نكاح الصغيرتين ههنا صيرورتهما ابنتين لزوجهما لا الاختية فكل كبيرة تفردت (٢) بافساد نكاح الصغيرة التي ارضعتها *

638 ٦٣٨ رجل تزوج امرأة فشهدت امرأة انها ارضعتها لا يثبت الحرمة بقولها و ان كانت عدلة - و ان تنزه كان افضل - و قال مالك رح يثبت الحرمة بشهادة

(٢ ن) تعمدت *

امرأة واحدة - لانها من باب الديانة فتثبت بقول الواحد - كما لو اشترى لحما فاخبره عدل انه ذبيحة المجوسي يحرم عليه - وانما نقول هذه لانها شهادة قامت على زوال ملك النكاح فلا تثبت الحرمة - كما لو قامت على الطلاق - و ان شهد بذلك امرأتان او رجل عدل فكذلك - و كذا لو شهد اربع نسوة - وقال الشافعي رح يفرق بينهما بشهادة الاربع - و كما لا يفرق بينهما بعد النكاح و لا تثبت الحرمة بشهادتهن فكذلك قبل النكاح *

۶۳۹ و ان[٢] اراد الرجل ان يخطب امرأة فشهدت امرأة قبل النكاح انها 639
ارضعتهما كان في سعة من تكذيبها كما لو شهدت بعد النكاح *

۶۴۰ و لو شهد رجلان عدلان او رجل امرأتان بعد النكاح عندهما لا يسعها المقام 640
مع الزوج - لان هذه شهادة لو قامت عند القاضي يثبت الرضاع فكذا اذا قامت عندهما *

۶۴۱ اذا اقر الرجل بامرأة انها اخته من الرضاع و لم يصر على اقراره 641
كان له ان يتزوجها - و ان اصر لا يحل له ان يتزوج - و لو اقر بعد النكاح بذلك و لم يصر على اقراره لا يفرق بينهما - و ان اصر فرق بينهما و كذا اذا[٣] اقرت المرأة قبل النكاح و لم تصر على اقرارها كان لها ان تزوج نفسها منه - فان اقرت بذلك و لم تصر و لم تكذب نفسها حتى زوجت نفسها منه جاز نكاحها - لان النكاح قبل الاصرار و قبل الرجوع عن الاقرار بمنزلة الرجوع عن اقرارها - و قد مرت هذه الجملة في فصل المحرمات - فان قالت المرأة بعد النكاح كنت اقررت قبل النكاح انه اخي من الرضاع و قد قلت ان ما اقررت به حق حين اقررت بذلك فلم يصح النكاح لا يفرق بينهما - و بمثله لو اقر الزوج بعد النكاح و قال كنت اقررت قبل

(٢ ن) اذا اراد الرجل انه يخطب * (٣ ن) و كذا لو *

النكاح انها اختي من الرضاع و قلت انه حق فان القاضي يفرق بينهما لان المرأة لو اقرت بعد النكاح ان الزوج اخوها من الرضاع و اصرت على ذلك لا يقبل قولها على الزوج و لا يفرق بينهما فكذلك اذا اسندت ذلك الى ما قبل النكاح - اما الزوج لو اقر بعد النكاح و اصر على اقراره فرق بينهما فكذا اذا اسند اقراره الى ما قبل النكاح *

فصل في الحضانة

۶۴۲ احق الناس بحضانة الصغير حال قيام النكاح او بعد الفرقة الام - فان ماتت الام او تزوجت فام الام - فان ماتت او تزوجت فام الاب - فان ماتت او تزجت فالاخت لاب و ام - فان ماتت او تزوجت فالاخت لام - فان ماتت او تزجت فابنة الاخت لاب و ام - فان ماتت او تز[illegible] فابنة الاخت لام - لم تختلف الرواية في ترتيب هذه [illegible] الجملة * 642

۶۴۳ انما اختلفت الرواية بعد هذا في الخالة [illegible] و الاخت لاب - في رواية كتاب النكاح الاخت لاب [illegible] اولى من الخالة - و في رواية كتاب الطلاق الخالة اولى * 643

۶۴۴ و بنات الاخوات اولى من بنات الاخوة - و بنات الاخت لاب و ام او لام اولى من الخالات في قولهم - و اختلفت الرواية في بنت الاخت لاب مع الخالة - و الصحيح ان الخالة اولى * 644

۶۴۵ و اولى الخالات الخالة لاب و ام ثم الخالة لام ثم الخالة لاب * 645

۶۴۶ و بنات الاخوة اولى من العمات - و الترتيب في العمات على نحو ما قلنا في الخالات * 646

۶۴۷ ولا حق للامة و ام الولد في الحضانة * 647

٦٤٨ و اهل الذمة في الحضانة بمنزلة اهل الاسلام * 648

٦٤٩ ولا حق للمرتدة * 649

٦٥٠ و انما يبطل حق الحضانة لهؤلاء النسوة بالتزوج اذا تزوجن باجنبي 650
فان تزوجن بذي رحم محرم من الصغيرة كالجدة اذا كان زوجها جد
الصغيرة او الام لو تزوجت بعم الصغير لا يبطل حقها *

٦٥١ و النساء احق بالحضانة ما لم يستغن الصغير - فان استغنى بان كان 651
يأكل وحده و يشرب وحده و يلبس وحده و في رواية و يستنجي
وحده فالاب بالغلام اولى والام بالجارية حتى تحيض - و عن محمد رح
حتى تبلغ حد الشهوة *

٦٥٢ و من لا ولاد لها من النساء(٢) لايبقى لها حق الحضانة بعد الاستغناء في 652
الغلام و الجارية - و بعد ما استغنى الغلام و بلغت الجارية فالعصبة اولى
يقدم الاقرب فالاقرب *

٦٥٣ و لا حق لابن العم في حضانة الجارية * 653

٦٥٤ فاذا اختلف الزوجان فادعى الزوج ان الام تزوجت بزوج آخر و انكرت 654
المرأة كان القول قولها - و ان اقرت انها تزوجت بزوج آخر لكن
ادعت ان ذلك الزوج طلقها و عاد حقها في الحضانة فان لم تعين
الزوج كان القول قولها - و ان عينت الزوج لا يقبل قولها في دعوى الطلاق *

٦٥٥ و لو اختلف الزوجان في سن الولد فقالت الام هو ابن ست سنين و انا 655
احق بامساكه و قال الوالد هو ابن سبع سنين و انا احق به فان القاضي
لا يحلف احدهما لكن ينظر الى الصبي ان رآه يستغني عن الوالدة بان
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لمصالحها الخارجية من الرسالة الى الابوين و نحو ذلك - و لا يفرض
لخادمها الخمار - لان شعرها ليس بعورة *

٧٠٤ ذمي تزوج بمحارمه فطلبت النفقة فان القاضي يقضي لها بالنفقة في 704
قول ابي‌حنيفة رحمه الله تعالى - و قال صاحباه رح لايقضي *

٧٠٥ و يجب على المعسر نفقة خادم المرأة - و لا تستحق المرأة نفقة الخادم 705

علي زوجها اذا لم يكن لها خادم في ظاهر الرواية موسرا كان الزوج او معسرا *

٧٠٦ امرأة طلبت من القاضي ان يفرض لها علي زوجها النفقة ان كان الزوج صاحب مائدة و طعام كثير لايفرض لها النفقة - و ان لم يكن كذلك يفرض لها النفقة بالمعروف شهرا شهرا - قال مشائخنا رح ذلك يختلف باختلاف حال الزوج(٢) - ان كان محترفا يفرض عليه النفقة يوما يوما - لانه عسي لايقدر علي تعجيل نفقة الشهر دفعة واحدة - و ان كان من التجار يفرض عليه شهرا فشهرا - و ان كان من الدهاقين يفرض سنة فسنة ينظر(٣) الي ما كان ايسر * 706

٧٠٧ و يفرض الكسوة في السنة مرتين في كل ستة اشهر كسوة * 707

٧٠٨ و اذا فرض القاضي علي الزوج لا تطالبه بنفقة ما مضي من الزمان قبل الفرض - لان عندنا لا تصير النفقه دينا الا بالقضاء او بالتراضي فان كانت المرأة(٤) استدانت قبل الفرض و انفقت علي نفسها لا ترجع بذلک علي الزوج - و ان فرض لها القاضي او صالحت زوجها من النفقة علي شيئ معلوم کل شهر فلم ينفق عليها حتي انفقت من مال نفسها او استدانت رجعت بذلک علي الزوج - امرها القاضي بالاستدانة او لم يأمر - و لو صالحت زوجها من النفقة علي ما لا يكفيها كان لها ان ترجع عن ذلک الصلح و تطلب الكفاية * 708

٧٠٩ وان فرض لها القاضي الكسوة لستة اشهر و اعطاها فضاعت الكسوة او سرقت لا يقضي لها بكسوة اخري مالم يمض سته اشهر - و كذا لو لبست الكسوة لبسا غير معتاد فتخرقت قبل مضي المدة - و لو لبست 709

(٢ ن) الرجل * (٣ ن) فينظر * (٤ ن) امرأة *

لبسا معتادا فتخرقت قبل الوقت قضى القاضي لها بكسوة اخرى
و ان مضت المدة و الكسوة قائمة ان لم تلبسها في تلك المدة يقضي
لها بكسوة اخرى - و كذا لو لبست تلك الكسوة و معها ثوب آخر
قضي القاضي بكسوة اخرى - و ان لم تلبس معها ثوبا آخر فمضت
المدة و الكسوة قائمة لايقضي بكسوة اخرى مالم تتخرق تلك الكسوة *

٧١٠ و كذا النفقة على هذه التفاصيل - ان هلكت او سرقت او اكلت 710
و اسرفت و لم تبق قبل مضي المدة لايقضي بنفقة اخرى - و ان لم
تصرف فلم تبق يقضي بنفقة اخرى *

٧١١ و يقضي القاضي بالكسوة والنفقة على قدر يسار الرجل و قدرته - فان 711
قال الرجل انا معسر و عليّ نفقة المعسرين كان القول قوله الا ان تقيم
المرأة البينة - و في ثمن المبيع و القرض اذا ادعى المديون انه معسر
لايقبل قوله - قالوا و كذلك في المهر و الكفالة - و قال بعض الناس
يحكم الزي - فان اقامت المرأة البينة انه موسر قضى عليه بنفقة
الموسرين - و ان اقاما البينة كانت البينة بينة المرأة - و ان لم تكن
لها بينة و طلبت من القاضي ان يسئل عن حال الرجل لايجب عليه
السؤال - و ان سأل كان حسنا - و ان اخبره عدل انه موسر لايقبل
القاضي ذلك - و ان اخبره عدلان انه موسر قضى القاضي بنفقة
الموسرين و ان لم يتلفظا بلفظ الشهادة - و يشترط العدد و العدالة
في هذا الخبر - و لايشترط فيه لفظة الشهادة - و ان قالا سمعنا انه موسر
او بلغنا ذلك لا يقبل القاضي ذلك *

٧١٢ و لو قضى القاضي على الزوج بنفقة المعسرين ثم ايسر فخاصمته 712
الى القاضي فرض القاضي عليه بنفقة الموسرين - لان النفقة تجب

ساعة فساعة - و هو نظير مالو شرع في صوم الكفارة ثم ايسر كان عليه
التكفير بالمال - و كذا لو فرض القاضي عليه النفقة بالدراهم و هي
لا تكفيها فان القاضي يزيد في النفقة *

٧١٣ و لو قضي القاضي عليه بالنفقه فغلا الطعام او رخص فان القاضي 713
يغير ذلک الحكم *

٧١٤ و لو قالت المرأة انه يريد السفر فخذ اي كفيلا بالنفقة قال ابو حنيفة 714
رحمه الله تعالى لايجبره القاضي على اعطاء الكفيل - كما لايجبر
القاضي على اعطاء الكفيل بالدين المؤجل اذا خاف الطالب ان
يغيب المديون قبل حلول الاجل - و عن ابو يوسف رح انه يأخذ
من الزوج كفيلا بالنفقه - و هكذا عن محمد رح في بعض الروايات - ثم
عند ابي يوسف و محمد رح يأخذ منه كفيلا بنفقه شهر واحد - و عن
ابي يوسف رح في رواية ان القاضي يسأل الزوج كم تغيب - فان قال
شهرا يأخذ منه كفيلا بنفقة شهر واحد - و ان قال اغيب شهرين يأخذ
كفيلا بنفقه شهرين - و كذا السنة (٢) - و اما في الدين المؤجل قالوا على
قياس ما روي عن ابي يوسف رح في النفقة لو اخذ كفيلا كان حسنا
و ذكر في المنتقى له ان يأخذ كفيلا بالدين المؤجل اذا اراد المطلوب
ان يسافر قبل حلول الاجل - و ذكر شمس الائمه الحلوائي رح اذا
بقي من الاجل شيئ قليل فاراد الغريم ان يسافر و سأل الطالب من
القاضي ان يأخذ منه كفيلا او يمنعه من السفر فان القاضي لايجيبه
الى ذلک و لا يأخذ منه كفيلا - قال و هذا في قولهم جميعا - و لم
يستحسن ابو يوسف رح في الدين المؤجل فكان هذا نقضا (٣) عليه *

(٢ ن) في السنة * (٣ن) نقصانا *

الخصاف لسقوط النفقة المفروضة سببا آخر فقال تسقط بموته و موتها و تسقط اذا طلقها و ابانها *

٧٢٢ و لو فرض القاضي للمطلقة نفقة العدة فلم تأخذ حتى انقضت العدة هل تسقط كما تسقط بالموت قال بعضهم لا تسقط - و ذكر شمس الائمة الحلوائي رح اذا فرض القاضي للمرأة نفقة العدة فلم تستوف حتى مات احد الزوجين تسقط - و كذا اذا انقضت عدتها قبل القبض * 722

٧٢٣ القاضي اذا فرض للمرأة النفقة فقال الزوج استقرضي كل شهر كذا و انفقي على نفسک ففعلت ليس لها ان ترجع على الزوج الا ان يقول و ترجعي بذلک علي * 723

٧٢٤ امرأة جاءت الى القاضي و قالت انا فلانة بنت فلان بن فلان و ان زوجي فلان بن فلان غاب عني و لم يخلف لي نفقة و طلبت من القاضي ان يفرض لها النفقة فهذا على وجهين - اما ان كان للغائب مال حاضر في منزله من جنس النفقة كالدراهم و الدنانير و الطعام و الثياب الذي يكون من جنس الكسوة و القاضي يعلم انها منكوحة الغائب فان القاضي يأمرها ان تنفق على نفسها بالمعروف من ذلک المال من غير سرف و لا تقتير بعد ما يحلفها القاضي بالله ما استوفيت النفقة و لم يكن بينكما سبب يمنع النفقة كالنشوز و غيره و يأخذ منها كفيلا - لانها لو ظفرت على مال الزوج بشيء من جنس النفقة كان لها ان تأخذ ذلک سرا و جهرا و ان كره الزوج - فكان امر القاضي اعانة لها على استيفاء الحق - و لم يكن قضاء الا انه يأخذ منها كفيلا و يحلفها نظرا للغائب - و ان كان القاضي لا يعلم نكاحها و ليس للغائب مال حاضر فاقامت المرأة البينة على النكاح لا يقبل القاضي بينتها - قال الحاكم 724

الشهيد وهذا قول ابي يوسف الآخر وهو قول محمد رح - وقال شمس الائمة السرخسي لا يقبل بينة المرأة عندنا بالاتفاق - و انما تقبل عند زفر رح - و قال و فرق ابو يوسف رح بين ما اذا كان للغائب مال حاضر و بين ما اذا لم يكن - ان كان له مال حاضر يقبل القاضي بينتها - و ان لم يكن لا يقبل - و قال شمس الائمة الحلوائي رح قال مشائخنا رح كنا نظن ان بينة المرأة على الزوج (٢) لا تقبل عند اصحابنا اذا لم يكن له مال حاضر و تقبل عند زفر رح و انما عرفنا قول ابي يوسف رح في هذه المسئلة كما هو قول زفر رح من الخصاف - فقال تقبل بينة المرأة على قول ابي يوسف و زفر رح في فرض النفقة على الغائب - ولا تقبل في النكاح - و ليس في قبول البينة على هذا الوجه ضرر بالغائب - فان الغائب اذا حضر لو اقر بالنكاح كان لها ان تأخذ النفقة المفروضة - و ان انكر النكاح كان القول قوله - و عليها اعادة البينة على النكاح - و يجوز ان تقبل البينة في حكم دون حكم - كما لو وكل رجلا بنقل عياله او عبده الى بلد فاقامت المرأة البينة على الطلاق و العبد على العتق تقبل هذه البينة في (٣) قصر يد الوكيل - ولا تقبل في الطلاق و العتاق - و عن ابي يوسف رح في رواية اذا لم يعلم القاضي بالنكاح و ليس للغائب مال حاضر فاقامت المرأة البينة على النكاح يقول لها القاضي ان كنت صادقة فقد فرضت لک النفقة على الغائب - و ان كنت كاذبة لم افرض - فان كانت صادقة تستحق النفقة و الا فلا - و القضاة في زماننا يقبلون البينة على النكاح لفرض النفقة - لانه مجتهد فيه و للناس حاجة - و على قول من يقبل هذه البينة لا تحتاج المرأة الى اقامة

(٢ ن) على النكاح * (٣ ن) في حق قصر يد الوكيل *

البينة ان الغائب لم يخلف لها النفقة - و كما لا يفرض القاضي على الغائب اذا لم يعلم بالنكاح في ظاهر الرواية لا يأمرها القاضي بالاستدانة و كان ابو حنيفة رحمه الله تعالى يقول اولا يأمرها بالاستدانة ثم رجع *

٧٢٥ و على هذا لو كان للغائب وديعة في يد رجل من جنس النفقة او دين 725
على رجل فطلبت(٢) المرأة نفقتها من الوديعة و الدين ان كان المودع و المديون مقرا بالوديعة و النكاح و الدين يأمرهما باداء النفقة نظرا للمرأة كما لو كان المال موضوعا في بيته بعد ما يحلفها بالله ما استوفيت النفقة - و يأخذ منها كفيلا في قولهم - و ان شاء ضمنها - و معنى هذا الضمان ان يقول لها لا اصدقك و لكني اقرضك فان كنت صادقة لا شيء عليك - و ان كنت كاذبة استرد منك المال - و الوديعة اولى من الدين في البداية بالانفاق عليها - و بعد ما امر القاضي المودع و المديون اذا قال المودع دفعت المال اليها لاجل النفقة قبل قوله - و لا يقبل قول المديون الا ببينة - و لو كان على الغائب دين آخر غير النفقة فاحضر صاحب الدين غريما آخر للغائب او مودعا للغايب لا يأمر القاضي المودع و المديون بقضاء الدين و ان كان مقرا بالمال و الدين - و لو دفع المودع الوديعة الى امرأة صاحب الوديعة لاجل النفقة او الى ولده او الى والديه ان دفع بامر القاضي لا ضمان عليه - و ان دفع بغير امر القاضي كان ضامنا كما لو قضى المودع بالوديعة دينا لصاحب الوديعة فانه يضمن - و لو كان المودع او المديون جاحدا للمال و النكاح فاقامت المرأة البينة على ما ادعت لم تقبل بينتها - اما في المال فلانها تثبت مالا للغائب و انها ليست بخصم عنه - و اما اذا اقامت البينة على

(٢ ن) وطلبت *

النكاح فلانها تثبت النكاح على الغائب و ليس من الغائب خصم حاضر فلا تقبل البينة في قول ابي حنيفة الآخر و هو قول صاحبيه رحمهم الله تعالى *

٧٢٦ و لو ان المرأة استدانت على زوجها الغائب يعني اشترت طعاما بالنسيئة لتقضي الثمن من مال الغائب ان استدانت بغير امر القاضي لا يلزم زوجها في قول ابي حنيفة الآخر - و هو قول صاحبيه - حتى لو حضر الغائب لا يكون لها ان ترجع على الغائب - و ان استدانت بامر القاضي رجعت بذلك على زوجها * 726

٧٢٧ و المفقود في جميع ما ذكرنا بمنزلة غائب آخر * 727

٧٢٨ و لا يباع على الغائب عروضه في النفقة * 728

٧٢٩ و اذا بعث الرجل الى امرأته بثوب فقال الزوج هو مهر او قال هو من الكسوة و قالت المرأة هي صلة كان القول قول الزوج - و كذا لو اعطاها دراهم فقال هي نفقة و قالت المرأة هي هدية كان القول قول الزوج و كذا لو كان على الرجل ديون مختلفة فادى شيئا و قال هو من دين كذا كان القول قوله - لانه هو المملك و كذلك الزوج الا ان تقيم المرأة البينة انه بعث اليها هدية - و ان اقاما جميعا البينة فالبينة بينة الزوج و كذا لو اقام كل واحد منهما البينة على اقرار الآخر كانت البينة بينة المملك * 729

٧٣٠ و كذا لو اختلف الزوجان بعد فرض النفقة في مقدار المفروض او فيما مضى من الزمان بعد فرض القاضي كان القول قول الزوج - لانه ينكر الزيادة - و البينة بينة المرأة لانها تثبت الزيادة * 730

٧٣١ رجل له عمامة واحدة لا يجبر على بيعها في النفقة - لانه لا يجبر على 731

بيع ثياب البدن في سائر الديون فكذلك في النفقة *

٧٣٢ و لا يباع على الزوج الحاضر عروضه في الدين و النفقة في قول 732
ابي حنيفة رح لان ذلك حجر و هو لا يرى الحجر - و قال صاحباه رح
يباع عروضه في الدين و النفقة *

٧٣٣ و اذا استعجلت المرأة نفقة مدة ثم ماتت قبل مضي تلك المدة 733
ليس للزوج ان يسترد شيئا من ذلك في قول ابي حنيفة و ابي
يوسف رحمهما الله تعالى - و قال محمد رح يسلم لورثتها حصة ما مضى
من المدة - و ترد الباقي على الزوج ان كان قائما - و من تركتها ان لم
يكن قائما - لانه عجل النفقة لاسقاط الواجب و قد بطلت النفقة
بالموت فيسترد المعجل لفوات الفرض - كما لو اعطى لامرأة نفقة ليتزوجها
فماتت كان له ان يسترد ذلك *

٧٣٤ و لو اعطى النفقة للتي طلقها ثلاثا في عدة المحلل ليتزوجها بعد 734
انقضاء العدة فلم تزوج نفسها منه قال الشيخ الامام ابو بكر محمد بن
الفضل رح ان اعطاها دراهم كان له ان يرجع الا ان يكون على وجه
الصلة - و قال غيره من المشائخ رح ان اعطى النفقة و شرط فقال انفق
عليك على ان تزوجني فزوجت نفسها منه او لم تزوج كان له ان يرجع
عليها - و ان لم يذكر ذلك الا انه عرف دلالة انه ينفق لاجل ذلك قال
بعضهم لا يرجع - و قال الشيخ الامام الاجل الاستاذ ظهير الدين رح
يرجع بذلك على كل حال - لانه رشوة الا ان ينص على الصلة *

٧٣٥ امرأة لها زوج معسر و ابن موسر يقال للابن اقرضه و يجبر عليه فان 735
ابى يفرض عليه النفقة *

٧٣٦ امرأة قالت لزوجها انت بري من نفقتي ابدا ما كنت امرأتك 736

ان لم يكن فرض القاضي عليه النفقة كانت البراءة باطلة - لانها ابرأته قبل الوجوب و ان كان القاضي فرض عليه النفقة لكل شهر كذا فقالت انت بري من نفقتي ابدا ما كنت امرأتك صحت البرأة من نفقة شهر واحد لا غير - و لو ابرأته بعد مضي اشهر صحت البراءة عما مضى دون ما بقي - كما لو آجر داره كل شهر بكذا او كل سنة بكذا فمضى بعض السنة او بعض الشهر صحت الاجارة من الشهر الاول و من السنة الاولى *

٧٣٧ و ذكر في كتاب الصلح رجل طلق امرأته ثم صالحته من نفقة العدة على 737
شيء ان كانت العدة بالشهور صح الصلح - و ان كانت بالحيض لا يصح - و لو صالحت المعتدة من سكناها على دراهم معلومة لا يصح في الوجهين لان السكنى حق الله تعالى فلا يصح اسقاط المرأة *

٧٣٨ رجل اتهم بامرأة فظهر بها حبل فزوجها ابوها منه و ابى الزوج ان 738
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٧٣٩ امرأة ماتت و لم تترك مالا قال ابو يوسف رح كفنها على الزوج - و عليه 739
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740 رجل قال لغيره استدن علی امرأتي و انفق عليها كل شهر كذا فقال ٧٤٠
المامور انفقت و صدقته المرأة لا يرجع المامور بذلك علی الزوج الا ان يكون القاضي فرض لها كل شهر عشرة دراهم فاذا اقرت المرأة ان المامور انفق عليها قبل قولها - لانها اخذت بقضاء القاضي - اما في الوجه الاول انما اخذت لتوجب علی زوجها دينا فلا يقبل قولها - و كذلك هذا في الولد الصغير *

741 رجل قال لغيره انفق علی امرأتي او علی عيالي فانفق المامور ٧٤١
بالمعروف قال الشيخ الامام الاجل شمس الائمة السرخي رح للمامور ان يرجع علی الآمر بما انفق *

742 العجز عن الانفاق لا يوجب حق الفراق - و قال الشافعي رح لها ان تطلب ٧٤٢
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۷۴۳ رجل يسكن في ارض المملكة يريد به ارض السلطان و يأخذ المال من السلطان فقالت المرأة لا اقعد معك في ارض المملكة ولا آكل من مالك قالوا ليس لها ذلك - و اثم ذلك يكون على زوجها - و لو امتنعت المرأة عن السكنى معه تصير ناشزة - و قد ذكرنا قبل هذا ان الزوج اذا كان يسكن في ارض الغصب فامتنعت منه لا تصير ناشزة - و يكون لها النفقة على زوجها - لان الغصب حرام لا شبهة فيه بخلاف ارض السلطان و ما له * 743

(۲ ن) فكان الشاهد *

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البيتوتة عندها للصحبة و الموانسة - لا فيما لا يملك و هو الحب و الجماع
لان الحب عمل القلب و الجماع يبتني[٣] على النشاط - و كل ذلك
لا يتعلق باختياره - اليه اشار رسول الله صلى الله عليه و سلم فقال هذه
قسمي فيما املك و لا تؤاخذني فيما لا املك *

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واحدة منهما يوما و ليلة - و ان كانت الجديدة ثيبا يقيم عندها ثلثة
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(٢ ن) و مما يجب * (٣ ن) ينبغي * (٤ ن) ان يستوي *

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الاخرى مثل تلک المدة *

٧٥٦ و لو كان للرجل امرأة واحدة و هو يقوم بالليل و يصوم بالنهار او يشتغل 756

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۷۵۷ و في المنتقى اذا تزوج امرأة و له امهات اولاد و سراري فقال اكون 757
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البراءة عن مؤنة السكنى بان قالت اكتري بيتا و اعتدت فيه
كان عليها ان تكتري بيتا و تعتد فيه *

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سقطت نفقتها - فان اعادها الى بيته بعد ذلک عادت النفقة - و ان
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نفقتها - فان اسلمت عادت النفقة - و ان ارتدت و لحقت بدار الحرب
ثم عادت مسلمة الى دار الاسلام لم تعد النفقة *

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ان تطالب الكفيل بالنفقة - لان نفقة العدة بمنزلة نفقة النكاح *

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و كذا لو كان القاضي فرض لها نفقة العدة فلم تأخذ حتى مات احدهما
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قال شمس الائمة الحلوائي رح تسقط النفقة *

۷۸۰ و لوكان الرجل غائبا فاستدانت المعتدة ثم قدم الغائب بعد انقضاء 780
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مراهقة لاتنقضي عدتها بالاشهر - لاحتمال انها حبلت بالوطي فينفق
عليها ما لم يظهر فراغ رحمها - فان حاضت استقبلت العدة بالحيض
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(۲ ن) للمنكوحة *

او يأتي بمن يطبخ و يخبز - و ان لم تكن من بنات الاشراف و ليس بها علة فعلى الزوج ان يأتي بالدقيق و نحو ذلك *

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٧٨٨ رجل تزوج منكوحة الغير و دخل بها فان كان لايعلم انها منكوحة الغير كان عليها العدة و لا نفقة لها - و ان كان يعلم انها منكوحة الغير لا عدة عليها - و في النكاح بغير شهود اذا دخل بها كان عليها العدة على كل حال * 788

٧٨٩ و اذا دخل على معتدته لاجل الاطلاع هل يباح له ذلك فيه روايتان * 789

٧٩٠ و اذا دفع الرجل زكوة ماله الى معتدته او شهد لها بشيئ لم تجز * 790

٧٩١ رجل طلق امرأته ثلثا و كتم فلما حاضت حيضتين دخل بها فحبلت ثم اقر بالطلاق كان عليها النفقة ما لم تضع حملها - و الله اعلم * 791

فصل في حقوق الزوجية

٧٩٢ للزوج ان يمنع المرأة من الغزل - و له ان يضربها على اربعة[٢] - منها ترك الزينة اذا اراد الزوج الزينة - و الثانية ترك الاجابة اذا اراد الجماع وهي طاهرة - و الثالثة ترك الصلوة - و في بعض الروايات عن محمد رح ليس له ان يضربها على ترك الصلوة - و ترك الغسل عن الجنابة و الحيض بمنزلة ترك الصلوة - و الرابعة الخروج عن منزله بغير اذنه بعد ايفاء المهر * 792

(٢ ن) اربعة اشياء *

٧٩٣ رجل له امرأة لا تصلي كان له ان يطلقها و ان لم يكن له مال يوفيها 793
مهرها - و حكي عن ابي حفص البخاري انه قال ان لقي الله و مهرها
في عنقه احب اليّ من ان يطأ امرأة لا تصلي *

٧٩٤ رجل يريد ان يطلق امرأته بغير ذنب ان اوفاها المهر و نفقة العدة 794
وسع له ذلک - لانه تسريح باحسان *

٧٩٥ و اذا ارادت المرأة ان تخرج الى مجلس العلم بغير اذن الزوج لم يكن 795
لها ذلک - فان وقعت لها نازلة فسألت زوجها و هو عالم فاخبرها
بذلک ليس لها ان تخرج بغير اذنه - و ان كان الزوج جاهلا و سأل
عالما عن ذلک فكذلک - و ان امتنع الزوج عن السوال كان لها ان تخرج
بغير اذنه - لان طلب العلم فيما يحتاج اليه فرض على كل مسلم
و مسلمة فيقدم على حق الزوج - و ان لم يقع لها نازلة و ارادت ان
تخرج الى مجلس العلم لتتعلم مسائل الصلوة و الوضوء فان كان الزوج
يحفظ تلک المسائل و يذكر لها ذلک ليس لها ان تخرج بغير اذنه - فان
كان الزوج لا يحفظ المسائل فالاولي له ان يأذن لها بالخروج - فان لم يأذن
فلا شيئ عليه - و لا يسع لها ان تخرج بغير اذنه ما لم يقع لها نازلة *

٧٩٦ امرأة لها اب زمن ليس له من يقوم عليه و زوجها يمنعها عن الخروج 796
اليه و تعاهده كان لها ان تعصي زوجها و تطيع الوالد مؤمنا كان الوالد
او كافرا لان القيام بتعاهد الوالد فرض عليها فيقدم على حق الزوج *

٧٩٧ قالوا ليس للمرأة ان تخرج بغير اذن الزوج الا باسباب معدودة - منها اذا 797
كانت في منزل يخاف السقوط عليها - و منها الخروج الى مجلس
العلم اذا وقعت لها نازلة و لم يكن الزوج فقيها - و منها الخروج الى
الحج الفرض اذا وجدت محرما *

798 ٧٩٨ و يجوز للزوج ان يأذن لها بالخروج و لا يصير[٢] عاصيا بالاذن - و منها الخروج
الى زيارة الوالدين و تعزيتهما و عيادتهما و زيارة المحارم - المرأة اذا كانت
قابلة فاستأذنت الزوج لدفع الولد - و كذا اذا كانت تغسل الموتى - و الى
مجلس العلم - و اذا كان عليها حق او لها حق على غيرها *

799 ٧٩٩ و ليس لها ان تعطي شيئا من بيته بغير اذنه *

800 ٨٠٠ و لا تصوم بغير فرض *

801 ٨٠١ و ليس عليها ان تعمل ببدنها شيئا لزوجها قضاء من الخبز و الطبخ
و كنس البيت و غير ذلك *

802 ٨٠٢ رجل له ام شابة تخرج الى الوليمة و المصيبة و ليس لها زوج لم يكن للابن
ان يمنعها ما لم يثبت عنده انها تخرج للفساد فح يرفع الامر الى القاضي
فاذا امره القاضي بالمنع كان له ان يمنعها - لانه قام مقام القاضي *

803 ٨٠٣ و سئل بعض العلماء عن امرأة لها زوج لا يصلي و المرأة تأبى ان تكون
معه قال ليس لها ذلك - كرجل عليه دين لرجل و على رب الدين
حقوق الله تعالى من الزكوة و الحج و العشر و هو لا يؤدي حقوق الشرع
ليس للمديون ان يمتنع عن قضاء الدين و يقول انه لا يؤدي حقوق
الشرع فلا أؤدي حقه *

804 ٨٠٤ رجل فاسق يتخذ الضيافة للفساق كان للمرأة ان تخبز و تطبخ الا انها
تنوي عند الطبخ و الخبز انهم ما داموا مشغولين بالاكل يمتنعون عن
الشرب كمن جلس عند الفساق ينوي انهم يمتنعون عن الفسق في تلك
الساعة كان له ذلك و يوجر عليه - و الله اعلم *

(٢ ن) و لا يكون *

فصل فى المرأة التي لا تدري انها منكوحة او مطلقه

٨٠٥ شاهدان شهدا على رجل انه طلق امرأته ثلثا و هي تدعي الطلاق او 805
تنكر او قالت لا ادري قبلت هذه الشهادة - لانها قامت على حق الله
تعالى فلا يشترط فيها الدعوى - فان عرفهما القاضي بالعدالة فرق بينها
و بين زوجها و يقضي لها بنفقة العدة و السكنى - لان المبتوتة تستحق
نفقة العدة - و ان لم يعرفهما القاضي بالعدالة يسأل عن حالهما و يمنع
الزوج عن الخلوة و الدخول عليها عدلا كان الزوج او فاسقا - و لا يخرجها
عن منزله - لانها منكوحة او معتدة - لكن يجعل معها امرأة عدلة ثقة تمنع
الزوج عن الدخول عليها - فان طلبت النفقة في مدة المسألة عن الشهود
فرض لها القاضي نفقة العدة ادعت الطلاق او لم تدع - لانها لو لم تكن
مطلقة تصير ممنوعة عن الزوج فيسقط النفقة و لو كانت مطلقة كان
لها النفقة فلا يسقط النفقة بالشك - فان طالت المسألة عن الشهود و
وجد منها ما تنقضي به العدة لم يعطها النفقة بعد ذلك - لانها لوكانت
منكوحة فهي ممنوعة عن الزوج - و لو كانت مطلقة فقد انقضت عدتها
و تيقنا بسقوط النفقة - فان عدلت البينة بعد ذلك يقضي بالطلاق و
يسلم لها ما اخذت - وان ردت البينة خلى القاضي بينها و بين زوجها و ترد
على الزوج ما اخذت من النفقة - لانه ظهر انها اخذت النفقة و هي ناشزة *

٨٠٦ و كذا لو قضى القاضي بالطلاق ثم ظهر ان الشهود كانوا عبيدا ردت على 806
الزوج ما اخذت من النفقة *

٨٠٧ و كذا لو تزوج امرأة فطلبت النفقة ففرض لها القاضي فاخذت النفقة 807
اشهرا ثم شهد الشهود انها اخته من الرضاع و فرق القاضي بينهما رجع

الزوج عليها بما اخذت من النفقة - لانه ظهر انها اخذت بغير حق - هذا
اذا اخذت بعد فرض القاضي - فان اعطاها الزوج سمحا لم يرجع
الزوج عليها بشيئ *

٨٠٨ و لو شهد الشهود على امة في يد رجل انها حرة قبلت البينة لما قلنا 808
في الطلاق - فان لم يعرفهم القاضي بالعدالة يسأل عن حالهم و يفرض
النفقة في مدة المسألة عن الشهود - و يجبره على اعطاء النفقة و يضعها
على يدي امرأة عدلة - و في فصل الطلاق ذكرنا انه لا يخرجها عن
منزله لانها منكوحة او معتدة فلا يجوز اخراجها - و ههنا ان كانت حرة جاز
اخراجها عن منزله فيخرجها و يضعها على يدي امرأة عدلة - و يكون اجر
الامينة في بيت المال - لانها عاملة لله تعالى و يأمر المدعى عليه بالنفقة
و ان طالت المسألة عن الشهود - بخلاف فصل الطلاق فان ثمه اذا وجد
ما ينقضي به العدة تسقط النفقة و ههنا ما لم يقض القاضي بالحرية
لا تسقط - و انما يجبره القاضي على النفقة لان الآدمي من اهل
الخصومة فيجري الجبر في حقه بخلاف غير الآدمي من الحيوانات
فان نفقة الحيوان تجب على المالك ديانة ولا يجري فيها الجبر - لانها
ليست من اهل الخصومة - فان اعطى المدعى عليه النفقة ثم عدلت
البينة و قضى بحريتها رجع المدعى عليه عليها بما اخذت من النفقة
سواء ادعت انها حرة الاصل او ادعت الاعتاق على المولى او لم تدع
الحرية - لانه ظهر انها اخذت النفقة بغير حق - وكذا لو اكلت شيئا
من ماله بغير اذنه - و ان ردت البينة ردت الجارية على المولى -
لا يرجع المولى عليها بشيئ - لانه انفق على مملوكه و لا يرجع ايضا
اخذ من ماله بغير اذنه - لان المولى لا يستوجب على مملوكه *

المال - و كذا رجل في يده امة شكت عند القاضي انه لا ينفق عليها امره القاضي بان ينفق عليها او يبيع - و ان اجبره القاضي على النفقة فاعطاها النفقة ثم قامت البينة انها حرة الاصل و قضى القاضي بالحرية رجع المولى عليها بتلك النفقة و بما اخذت من ماله بغير اذنه ولا يرجع بما اكلت باذنه

٨٠٩ رجل ادعى امة في يد رجل انها له فانكر المدعى عليه فاقام المدعي 809
بينة على ما ادعى يضعها القاضي على يدي عدل حتى يسأل عن الشهود و يأمر المدعى عليه بالانفاق عليها - لقيام الملك من حيث الظاهر - فان انفق عليها ثم ردت البينة بقيت الجارية للمدعى عليه ولا شيئ عليها - لانه ظهر انه انفق على مملوك نفسه - فان عدلت البينة و قضى القاضي للمدعي لم يرجع المدعى عليه بما انفق - لانه ظهر انها كانت مغصوبة اكلت من مال الغاصب - و جناية المغصوب على الغاصب - هذا في قول ابي حنيفة رحمه الله تعالى - و في قول ابي يوسف و محمد رح انه يكون ذلك دينا في رقبة الامة تباع فيه او يفديها المولى - فان بيعت او فداها المولى رجع [٢] على المدعى عليه بالاقل من قيمتها و من النفقة التي لحقها - و ان كان المدعي عبدا ان كان صغيرا او مريضا لا يقدر على الكسب فهو بمنزلة الامة يؤمر المدعى عليه بالانفاق كما في الامة لكن لا يؤخذ العبد من المدعى عليه بل
٨٠٦ ترك في يده و يوخذ منه كفيل بالمدعى به الا ان يكون المدعى عليه مخوفا يخاف انه يغيبه ثم يوخذ منه - و ان كان العبد كبيرا يقدر
٨٠٧ على الكسب يترك العبد في يد المدعى عليه لما قلنا - ولا يجبر على

(٢ ن) يرجع المولى *

النفقة بل يؤمر العبد بالاكتساب و النفقة علي نفسه من كسبه - و الامة اذا كانت تقدر علي الكسب كالخبز و الخيـــاطة و نحوها فهي بمنزلة العبد *

٨١٠ و الرجل اذا اخذ عبدا آبقا و رفع الامر الي القاضي فان القاضي يأمر الذي في يديه ان ينفق عليه و يرجع على المولي بذلك - و لا يؤمر العبد بالاكتساب كيلا يأبق - و الله اعلم * 810

فصل في نفقة الاولاد

٨١١ نفقة الاولاد الصغار و الاناث(٢) المعسرات على الاب لا يشاركه في ذلك احد و لا تسقط بفقره * 811

٨١٢ و لا يجب عليه نفقة الذكور الكبار الا ان يكون الولد عاجزا عن الكسب لزمانة او مرض فيكون نفقته علي والده - و من يقدر على العمل لكن لايحسن العمل فهو بمنزلة عاجز - لان من لا يحسن العمل لا يستأجره الناس * 812

٨١٣ قال الشيخ الامام شمس الائمة الحلوائي رح و قد لايقدر الرجل الصحيح علي الكسب لحرفة او لكونه من اهل البيوتات فاذا كان هكذا كانت نفقته علي والده و ان كانت له قوة العمل - قال و هكذا قالوا في طالب العلم اذا كان لا يهتدي الي الكسب لا يسقط نفقته عن والده و يكون كالزمن و الانثي * 813

٨١٤ و الولد الصغير اذا كان رضيعا فان كانت الام في نكاح الاب و الصغير يأخذ لبن غيرها لا تجبـر الام علي الارضاع - و ان لم يأخذ الولد لبن غيرها قال شمس الائمة الحلوائي رح في ظاهر الرواية لا تجبر ايضا و عن ابي حنيفة و ابي يوسف رحمهما الله تعالي تجبر - قال شمس الائمة 814

السرخسي رح تجبر - و لم يذكر فيه خلافا و عليه الفتوى *

٨١٥ فان لم يكن للاب و لا للولد الصغير مال تجبر الام على الارضاع عند الكل * 815

٨١٦ و ان استأجر الام على ارضاع الولد و هي في نكاحة لاتستحـــق الاجر 816
في قولهم - و ان استأجرها لارضاع ولد ليس منها كان لها الاجر *

٨١٧ و ان كان طلق الام و انقضت عدتها فاستأجرها لارضاع الولد صح الاستيجار 817
و هي اولى من الاجنبية *

٨١٨ و ان كانت الام في العدة من طلاق بائن او ثلث فاستأجرها لارضاع 818
الولد فيه روايتان - في رواية الاصل تستحق الاجر - و في رواية الاجارات
لا تستحق - و ان ابت الام ان ترضعه بعد انقضاء العدة كان على الاب
ان يستأجر امرأة ترضعه عند الام - و لا ينزع الولد من الام - فان قالت
انا ارضعه بما ترضع الظئر فهي اولى - و ان طلبت الزيادة ليس لها
ذلک - و بعد الفطام يفرض القاضي نفقة الصغار على قدر طاقة الاب
و يدفع الى الام حتى تنفق على الاولاد - لانها تصلح الطعام لاكل الولد
فان لم تكن الام ثقة يدفع الى غيرها لينفق على الولد *

٨١٩ امرأة طلقها زوجها و لها اولاد صغار فاقرت انها قبضت نفقتهم لخمسة اشهر 819
ثم قالت بعد ذلک كنت قبضت العشرين و نفقة مثلهم في مثل
تلک المدة مائة درهم ذكر في المنتقى ان هذا على نفقـة مثلهم
و لا تصدق انها قبضت عشرين - فان قالت بعد اقرارها بقبض النفقة
ضاعت النفقة فانها ترجع على ابيهم نفقة مثلهم *

٨٢٠ امرأة اختلعت من زوجها على ان ابرأته من نفقتها و نفقة ولدها رضيعا 820
كان ام لا و على نفقة ما في بطنها من الولد قال عليها ان ترد المهر الذي

(٢ ن) الاناث الكبار المعسرات *

اخذت و لا نفقة عليها للولد و يحتسب لها نفقتها مادامت في العدة *

۸۲۱ امرأة ادعت على زوجها انه لم ينفق على ولدها الصغير قالوا ان كان 821
القاضي فرض عليه نفقة الولد او فرض الزوج على نفسه فادعت المرأة
ذلك بعد (۲) مضي مدة و انكر الزوج حلف و الا فلا *

۸۲۲ رجل معسر له ولد صغير ان كان الرجل يقدر علي الكسب يجب عليه 822
ان يكتسب و ينفق على ولده - و ان كان لا يقدر على الكسب يفرض
القاضي عليه النفقـــة و يأمر الام حتي تستدين على زوجها ثم ترجع
بذلك على الاب اذا ايسر - و كذا لوكان الاب يجحد نفقة الولد و يمتنع
من الانفاق يفرض القاضي عليه النفقة ثم ترجع الام عليه بذلك - و كذا لو
فرض القاضي على الاب نفقة الولد فتركه الاب بلا نفقة فاستدانت الام
و انفقت بامر القاضي كان لها ان ترجع بذلك على الاب *

۸۲۳ و يحبس الاب بنفقة الولد و ان كان لا يحبس بسائر ديونه * 823

۸۲۴ ولو فرض القاضي النفقة على الاب فلم تستدن الام و اكل الولد بمسألة 824
الناس لا ترجع على الاب بشيئ - و ان حصل له بمسألة الناس نصف
الكفاية يسقط نصف النفقة عن الاب - و يصح الاستدانة بالنصف الباقي *

۸۲۵ و كذا اذا فرضت عليه نفقة المحارم فاكلوا من مسألة الناس لا يرجع 825
على الذي فرضت عليه النفقة بشيئ الا المرأة اذا فرضت لها النفقة
فاكلت من مال نفسها او من مسألة الناس كان لها ان ترجع بالمفروض
على زوجها *

۸۲۶ رجل غاب و لم يترك لاولاده الصغار نفقة و لا (۳) معهم مال تجبر الام على 826
الانفاق ثم ترجع بذلك على الاب *

(۲ ن) بعد ما مضى مدة * (۳ ن) و لا بهم *

٨٢٧ صغير بلغ حد الكسب و لم يبلغ مبلغ الرجال كان للاب ان يسلمه في عمل 827
او يواجره بعمل(٢) اوخدمة وينفق عليه من ذلك - و ان كان الولد بنتا لايملك
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شيئ علي غيرهما - و لو جعل من لا يجب عليه النفقة كالمعدوم اصلا كانت نفقة الصغير علي الام و الاخت لاب و ام اخماسا - ثلثة اخماس علي الاخت لاب و ام و الخمسان علي الام اعتبارا بالميراث *

٨٦٤ صغير له ام موسرة و له اخوان موسران اخ لاب و ام و اخ لاب كانت نفقة 864
الصغير علي الام و الاخ لاب و ام اسداسا - السدس علي الام - و خمسة اسداس علي الاخ لاب و ام اعتبارا بالميراث *

٨٦٥ رجل مات و ترك ولدا صغيرا و ابا كانت نفقة الصغير علي الجد - فان 865
كانت للصغير ام موسرة و جد موسر كانت نفقة الصغير علي الجد و الام اثلاثا في ظاهر الرواية اعتبارا بالميراث - و في رواية الحسن رح عن ابي حنيفة رحمه الله تعالى كانت نفقة الصغير علي الجد كما لو كان مكان الجد اب - فان كانت الام فقيرة كانت نفقة الصغير علي الجد - و يجعل الام كالمعدومة *

٨٦٦ و لو كانت الام موسرة و للصغير اخ موسر لاب و ام وجد موسر اب 866
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٨٦٧ امرأة معسرة لها ابن صغير معسر ولها ثلث اخوات متفرقات كانت نفقة 867
الصغير علي الخالة لاب و ام - لان الام تحرز كل الميراث فتجعل كالمعدومة و عند عدم الام كانت نفقة الصغيرة علي الخالة لاب و ام خاصة اعتبارا(۲) بالميراث - و اما نفقة الام علي اخواتها علي خمسة - ثلثة اخماسها علي الاخت لاب و ام و خمس علي الاخت لاب وخمس علي الاخت لام *

٨٦٨ امرأة معسرة لها ولد موسر و ابوان معسران كانت نفقتها علي الولد 868

(۲ ن) باعتبار الميراث *

دون الابوين لا يشارک الولد في نفقة الوالدين احد كما لا يشارک الوالد في نفقة الولد احد في ظاهر الرواية *

٨٦٩ و كذلک معتوه له ابن و اب كانت نفقة المعتوه علي الابن دون الاب * 869

٨٧٠ امرأة لها ابنان موسران فقضي عليهما بالنفقة فابى احدهما ان ينفق 870
يقضى على الآخر بجميع النفقة ثم يرجع هو على اخيه بنصف ذلک *

٨٧١ امرأة معسرة لها ثلث بنات اخوة متفرقين او ثلث بنات اخوات 871
متفرقات قال ابو يوسف رح كل النفقة يكون على التي من قبل الاب و الام - و قال محمد رح في بنات الاخوات خمس النفقة على بنت الاخت لام و الخمس علي بنت الاخت لاب و ثلثة اخماس علي بنت الاخت لاب و ام - و في بنات الاخوة سدس النفقة على بنت الاخ لام و الباقي على بنت الاخ لاب و ام - و لا شيئ على الاخرى - والله اعلم *

فصل في نفقة المملوک

٨٧٢ عبد او مدبر تزوج امرأة باذن المولى كان عليه نفقة المرأة - فان ولد له 872
اولاد لا يجب عليه نفقة الاولاد حرة كانت المرأة او مملوكة - اما اذا كانت حرة فولدها يكون حرا فلا يجب عليه نفقة الولد الحر - و ان كانت مملوكة كان الولد مملوكا لمولى الام فكانت نفقتهم على مولى الام *

٨٧٣ و كذا المكاتب اذا تزوج امرأة لا يجب عليه نفقة الولد الا ان يكون له 873
ولد ولد في مكاتبته من امته فتجب على المكاتب نفقة هذا الولد - وكذا المكاتب اذا تزوج امة فولدت منه اولادا او لم تلد حتى اشتراها فولدت كانت نفقة الولد على المكاتب *

٨٧٤ و لو تزوج المكاتب مكاتبة و مكاتبتهما(٢) واحدة و مولاهما واحد فولد لهما ولد 874
في المكاتبة فان نفقة الولد تكون علي الام - لان المولود يكون تبعا للام و
يكون كالمملوك لها فكانت نفقته عليها *

٨٧٥ و كذا الحر اذا تزوج امة او مكاتبة او ام ولد او مدبرة كان عليه نفقة 875
المرأة الا ان في الامة و المدبرة و ام الولد لا يجب علي الزوج نفقتها
ما لم يبوأها المولى بيتا - و في المكاتبة تجب نفقتها على زوجها و
لا يشترط التبوية - و لا يجب علي الزوج نفقة الاولاد انما يكون نفقة الولد
على مولى الام اذا كانت امة او مدبرة او ام ولد *

٨٧٦ فان كان مولى الامة و المدبرة و ام الولد فقيرا و الزوج اب الاولاد غنيا 876
هل يجب علي الاب نفقة الاولاد في ولد الامة - لا يجب علي الزوج
لان ولد الامة يكون مملوكا لمولى الامة فينفق عليه المولى او يبيعه كما
لو عجز المولى عن الانفاق علي الامة - و ان كان الولد من المدبرة
او ام الولد و مولى الام فقير لا يمكن البيع ههنا - فيومر الاب ان ينفق
على الولد ثم يرجع على المولى *

٨٧٧ رجل زوج امته من عبده و بوأها بيتا او لم يبوئها كانت نفقة الامة و 877
العبد على مولاهما - فان ابى ان ينفق عليهما امر بالبيع *

٨٧٨ رجل زوج ابنته من عبده فطلبت النفقة تفرض لها النفقة على زوجها * 878

٨٧٩ رجل تزوج امة و لم يبوأها المولى بيتا حتى طلقها طلاقا رجعيا كان 879
لمولاها ان يأمر الزوج ليتخذ لها بيتا و ينفق عليها في العدة - و ان
كان الطلاق بائنا ليس للمولى ان يخلي بينها و بين زوجها - و هل
له ان يطلب نفقة العدة قال الخصاف رح له ذلك - و قال بعض العلماء

(٢ ن) مكاتبهما واحد *

ليس له ذلک وهو الصحيح - لانها ما كانت تستحق النفقة قبل الطلاق البائن قبل التبوية - فلا تستحق بعد الطلاق البائن *

٨٨٠ و لو كان الطلاق رجعيا ثم عتقت كان لها ان تطلب من زوجها ان يبوأها بيتا و ينفق عليها حتى تنقضي عدتها - و ان كان الطلاق بائنا ليس لها ان تأخذه بالسكنى - لانه لم يكن لها عليه السكنى قبل الطلاق اذا لم يكن بوأها بيتا فكذلک بعد الطلاق - و هذا يؤيد قول بعض العلماء في المسئلة الاولى * 880

٨٨١ رجل وجد عبدا آبقا فاخذه ليرده على مولاه فانفق عليه ان انفق بغير امر القاضي كان متطوعا لا يرجع عليه - و ان كان وقع الامر الى القاضي و سال من القاضي ان يأمره بالنفقة ينظر القاضي في ذلک - فان رأى الانفاق اصلح امره بالانفاق - و ان خاف ان يأكله النفقة يأمره القاضي بالبيع و امساک الثمن - و كذا اذا وجد دابة ضالة في المصر او في غير المصر * 881

٨٨٢ و لو ان رجلا غصب عبدا كانت نفقته عليه الى ان يرده علي المولى فان طلب من القاضي ان يأمره بالنفقة او بالبيع لا يجيبه - لان المغصوب مضمون علي الغاصب الا ان يكون الغاصب مخوفا يخاف منه علي العبد فح يأخذه القاضي و يبيعه و يمسک الثمن * 882

٨٨٣ و لو اودع رجل عبدا فغاب فجاء المودع الي القاضي و طلب منه ان يأمره بالنفقة او بالبيع فان القاضي يأمره بان يؤاجر العبد و ينفق عليه من اجره - و ان رأى ان يبيعه فعل * 883

٨٨٤ رجل اوصى بعبده لانسان و بخدمته لآخر كانت نفقته على صاحب الخدمة - فان مرض في يد صاحب الخدمة ان كان مرضا لا يمنعه عن الخدمة كان نفقتـــه على صاحب الخدمة - و ان كان مرضا يمنعه عن 884

الخدمة كانت نفقته على صاحب الرقبة - و ان تطاول المرض ورأى
القاضي ان يبيعه فباعه و يشتري بثمنه عبدا يقوم مقام الاول في الخدمة *

٨٨٥ و عبد الرهن اذا ثبت كونه رهنا يفعل به ما يفعل بالوديعة * 885

٨٨٦ عبد بين رجلين غاب احدهما و تركه عند الشريك فرفع الشريك الامر 886
الى القاضي و اقام البينة على ذلك كان القاضي بالخيار ان شاء قبل
هذه البينة و ان شاء لم يقبل - و ان قبل يأمره بالنفقة و يكون الحكم فيه
ما هو الحكم في الوديعة *

٨٨٧ عبد صغير او زمن او معتوه اعتقه مولاه لا يجب على المعتق نفقته 887
بحال ما - و الله اعلم و هو احكم الحاكمين *

تم المجلد الاول من فتاوى قاضي خان

Tagore Law Lectures—1891-92.

MAHOMEDAN LAW

RELATING TO

MARRIAGE, DOWER, DIVORCE, LEGITIMACY AND GUARDIANSHIP OF MINORS, ACCORDING TO THE SOONNEES.

VOL. II.

MARRIAGE AND OTHER COGNATE SUBJECTS, INCLUDING AGENCY AND GUARDIANSHIP IN RELATION TO MARRIAGE, PROHIBITED DEGREES, NUSUB OR PARENTAGE, DOWER, CLAIMS REGARDING MARRIAGE, IMPOTENCY, RIGHT OF ELECTION OR OPTION IN REGARD TO MARRIAGE, FOSTERAGE, HIZANUT OR CUSTODY OF MINORS, AND MAINTENANCE.

BY

HON'BLE MOULVI MAHOMED YUSOOF KHAN BAHADUR,

PLEADER OF THE CALCUTTA HIGH COURT.

Calcutta:

THACKER, SPINK & CO.

Publishers to the Calcutta University.

BOMBAY: THACKER & CO., LIMITED. MADRAS: HIGGINBOTHAM & CO.

LONDON: W. THACKER & CO.

CALCUTTA:—PRINTED AT THE BAPTIST MISSION PRESS.
1895.

THE TAGORE LECTURES, 1891-92.

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THE TAGORE LECTURES, 1891-92.

BOOK II.

MARRIAGE AND DIVORCE.

PART I.

ON MARRIAGE, AND OTHER MATTERS RELATING TO AND FLOWING FROM MARRIAGE.

CHAPTER I.

ON SUBJECTS ON WHICH THE CONSTITUTION OF MARRIAGE DEPENDS.

900. The author of the "Kazee Khan" treats of Marriage in eight chapters. The first chapter deals with the subjects on which the constitution of marriage depends, and this chapter consists of eight sections.

SECTION I.

ON WORDS BY THE USE OF WHICH MARRIAGE IS CONSTITUTED.

901. (1.) Marriage is effected by the use of the words "*Nikah*" or "marrying," and "*Tuzweej*" or "giving in marriage," when those words are used as giving information of the past. For instance, if the woman were to say, "I have given myself in marriage to thee for so much," in the presence of witnesses; and then the man were to say, "I have accepted."

902. (2.) Or when those words are used in the future form (to denote the present tense. This form in Arabic is used to indicate both the future and the present tense). For instance, if the man were to say to the woman "I marry thee for so much;" and then the woman were to say, "I have accepted."

903. (3.) Or when those words are used in the imperative sense. For instance, if the man were to say, "Give thyself in marriage to me for so

much;" and then the woman were to say, "I have given myself in marriage."

904. (4.) And in the same way in which marriage is constituted by the use of the words "*Nikah*" (or marrying), and "*Tazweej*," (or giving in marriage), so is it constituted by the use of words which denote the creation of immediate ownership in the substance of a thing according to us, that is, the Hanifites, as distinguished from the followers of Shafei; (as for instance, words denoting gift or *hiba* or sale or *beya*, which create ownership in the substance of a thing, as contra-distinguished from words which indicate ownership not in the substance of the thing but in the profits, such as *Ijara* or lease.)

It is reported from Aboo Haneefa that he holds that whatever word has the effect of creating ownership of person (*Rukba*), if applied to the case of a female slave, creates ownership of *Nikah*, when applied to a free woman (*Hoorra*).

When a woman says to a man in the presence of witnesses, "I have made a gift of my person to thee," or "bestowed my person on thee," by way of *Nikah*, and then the man says, "I have accepted:" this is a contract of marriage. And in the same way if the woman were to say, "I have made you owner of my person," or if the man were to say to her, "Make me the owner of your person," and then the woman were to say, "I have made thee owner:" this is a contract of marriage. And if the woman were to say, "I have sold to thee my person for so much," and then the man were to say, "I have purchased," or "I have accepted:" this is, correctly speaking, a contract of marriage. In the same way, if the father were to sell his daughter in the presence of witnesses, this is marriage.

905. (5.) So also, it would be a valid contract of marriage if the woman were to say, "I have made myself wife to thee," and the man were to say, "I have accepted."

906. (6.) But if the woman were to say, "I have made my person allowable to thee," or "given a loan of it to thee," or "made it lawful to thee," or "lent it to thee," or "given it in trust, or *Wadeeut*, to thee," or "mortgaged it to thee," and the man were to say, "I have accepted," then there is no marriage, and what is established is doubt (*Shoobha*, or doubtful marriage.)

907. (7). And also, if the woman were to say, "I have given a lease of my person to thee for so much;" and then the man were to say, "I have

accepted," or "taken the lease," then there is no marriage. But Koorkhy says, in this case there is marriage.

908. (8.) And if the woman were to say, "I have made a gift of my person to thee;" and then the man were to say, "I have taken it;" the learned say there is no marriage (because the husband has not said "I have *accepted* it)."

909. (9.) And if a woman were to say to a man, "I have married thee on condition that thou agree to pay me 1,000 dirhems:" and then the man were to say, "I have permitted it;" and then if the woman were to say, "I have accepted;" in this case, Sheikh Ool Imam Aboo Bukur Mahomed, son of Fuzul (may God have peace on him), says this is marriage.

910. (10.) And he, Sheikh Imam Aboo Bukur Mahomed, son of Fuzul, is also reported to have said, If the man says to the father of the girl, "Dost thou marry thy daughter to me?" and then the father of the girl says, "I have married my girl (daughter) to thee," or "Yes;" this is no marriage, unless the man were to say after all this, "I *have accepted*."

911. (11.) There is a great difference between this case and the following case; *viz.*, if the man were to say to the father of the girl, "Give in marriage to me your daughter," and the father of the girl were to say, "I have given (her) in marriage," or "I have done so:" in this latter case there is marriage; and the reason of the difference, as Sheikh Imam Aboo Bukur Mahomed says, is this: that when the man asks, "Dost thou marry thy daughter to me" he puts a question for his information, and it does not amount to a contract of marriage. On the contrary when he says, "Give thy daughter in marriage to me," he makes the father of the girl his vakeel, with authority to contract the marriage on his behalf."

912. (12.) If a man makes to a woman a proposal of *Zina* or adulterous intercourse, and the woman says, "I have bestowed my person on thee," and the man says, "I have accepted;" this will not amount to (*Nikah*) marriage. The result of the above case is the same as if the father of the woman were to say, "I have given her to thee in order that she might serve thee," and then the man were to say, "I have accepted;" this will not amount to *Nikah*: and so also, if the woman were to say, "I have made my person *Feda* for thee" (I have bestowed myself in alms on thee), this will not amount to *Nikah*: and this is correct.

913. (13.) A man says to another in Persian, "Hast thou given thy daughter to me?" if then the other were to say, "I have given;" this will

not amount to a *Nikah* : in the same way, if a man were to say to a woman "Be mine," or "Hast thou become mine?" and then the woman were to say, "I have become;" this will not amount to *Nikah*, until (in both cases) the man were to say, "I have accepted." And if the man were to say, "Hast thou become mine as wife?" and the woman were to say, "I have become;" this will amount to *Nikah*.

914. (14.) A man says in the presence of witnesses (in Persian), "This is my wife," and the woman says, "This is my husband," the fact being that there was no previous marriage between them; the learned have disagreed amongst themselves in this case (whether this would be sufficient to constitute marriage). Byehuky, on whom be peace, has said in his work,—where a man and a woman, between whom there is no *Nikah*, agree amongst themselves to admit the *Nikah*, and then they both acknowledge the *Nikah*, this acknowledgment will not be binding upon them (as constituting *Nikah*) : for, says he, an acknowledgment is the giving of information of an antecedent event, and in this case there was no antecedent event: and in the same way, in a case of sale, when both parties acknowledge the sale, which had not taken place, the sale will not be constituted by their agreeing to allow it to stand. In the chapter on (*Soolah*) compromise in the *Asul*, it is said, "A man makes a claim of *Nikah* against a woman : the woman denies the claim : the man compromises with the woman for 100 dirhems, on condition that the woman would admit the *Nikah*: the woman accordingly admits the *Nikah* : the admission is valid (as constituting *Nikah*) : for (says the author of the *Asul*) the woman (must be considered to have) meant that she gives herself in marriage now for the first time for 100 dirhems. On the contrary, if the woman makes a claim of *Khoola* (or divorce) against her husband (saying the husband had given her divorce by way of *Khoola*), and the latter denies the claim, and then compromises with the wife for 100 dirhems, on condition that she would give up her claim, this is not valid (because it has the effect of defeating the *Khoola*, which remains, as it was before, unaffected by the compromise).

915. (15.) It is said in the Nuwazil that if a man and woman were to make an admission in the presence of witnesses in the Persian language (saying), "We are husband and wife," marriage (*Nikah*) would not be constituted between them.

916. (16.) And so also, if the man were to say, "This is my wife,"

and the woman were to say, "This is my husband:" this will not constitute *Nikah* or marriage. And if witnesses were to say (after the above declaration of the man and woman), to the man and woman, "Have you agreed (or consented)," or "Have you permitted?" and they were to say, "We have agreed (or consented)," or "We have permitted," this will not constitute *Nikah* (or marriage); because permission is to give effect (*Tunfeez*) to the contract and not *Insha* (or creation of a contract): and if the witnesses were to say, "Have you rendered this (that is, the above declaration of the man that the woman is his wife, and of the woman that he is her husband) *Nikah* or marriage? and if they were to say, "Yes:" this will be *Nikah* (or contract of marriage); because to render (*Jaal*) means *Insha* (and their saying "Yes" amounts to *Insha*, as the answer embodies the question), and the Moulana (the author of '*Kazee Khan*') has said that, "It is fit that the answer (to the question as to the result in such a case) should be with some detail regarding the meaning which the parties wished should be attached to the word 'Yes.'

917. (17.) And if they (the man and the woman) were to make an admission of a past marriage contract (*akd*), the fact being that there never was between them a marriage contract, this admission (of a past marriage) will not constitute a marriage between them (because admission is *Ikhbar*, or information, whereas what is necessary to constitute marriage is *Insha*): but if the woman were to make the admission saying, "He is my husband," and the husband were to make the admission (saying), "She is my wife," this will amount to *Nikah* (or marriage contract); and this admission of theirs implies *Insha* of *Nikah* between them, contrary to the case where the admission was of a past contract, which had never taken place; because that is a false statement; and that rule (in the two cases) is analogous to what Aboo Haneefa has said, that if a man were to say to his wife, "Thou art not my wife," intending thereby a divorce (*Talak*), this will cause divorce, and the husband's declaration will be taken as if he had said, "Thou art not my wife because I have divorced thee;" but if the husband were to say, "I have not married thee," intending thereby divorce, this will not (be sufficient) to cause divorce, because this is merely a false statement, of which no correction is possible.

918. (18.) A man says to a woman, who was irrevocably divorced by him (*Moobayana*), or who had obtained divorce in the form of *Khoola* (*Mookhtala*), "I have taken thee back (I have made *Rajaat*), for such an

amount," in the presence of witnesses, this will amount to marriage contract (*Nikah*), (provided the woman afterwards signifies her assent) : but if the man does not say, "For such an amount," the learned have said, that this will not amount to marriage : and to this effect is the opinion of Hakim in (his work called) "The Moontuka :" and so also when a woman, who has been irrevocably divorced, says to the husband, "I have brought myself back to thee ;" her saying so amounts to *Rujuat* (provided the husband accepts the proposition). Some of the learned have said that when a man says to a woman, who has been irrevocably divorced, or to a woman who has obtained her divorce in the form of a *Khoola*, "I have taken thee back" in the presence of witnesses, and the woman says, "I have accepted :" this will amount to marriage (although the man has not said for such an amount).

919. (19.) But if the man were to express himself in this way, "I have taken thee back" to a strange woman, with whom there never had been a marriage, in the presence of witnesses, and the woman were to say, "I have consented," this will not amount to marriage, (because "I have taken thee back" *implies restoration to the former position, which, in this case,* was that of a stranger and not a state of marriage).

920. (20.) A man says to another, "Give thy daughter in marriage to me for a thousand dirhems." Then the father of the girl says in the presence of witnesses, "Pay them, and take her wherever it pleaseth thee," says Sheikh Ool Imam Aboo Bukur Mahomed, son of Fuzul, on whom be peace! "This will amount to marriage. (See Futawai Alumgiree, Vol. I, page 383, line 20, where in this very case, it is said, that this will not amount to *Nikah*. The reason for the invalidity is, that if, on one side, the imperative form be used, the past tense must be used on behalf of the other party, as in paragraph 3 above. The reason for the validity of the *Nikah* is, that the statement of the man in the imperative form amounts to a delegation of authority by him to the father of the bride, and the same person could act for both parties in the case of marriage but not in any other transaction. Then, when the father of the girl says, "Pay the dirhems," &c., this is capable of explanation as meaning,—"I have married my daughter to thee ;" but not having used the past tense, the better authority is that the *Nikah* is not valid.)

921. (21.) The father of his minor son, in the presence of witnesses, says, "You be witness that I have verily given in marriage the daughter

of Ahmed, (meaning by Ahmed the father of the minor daughter), with my son, so and so, for such and such dower," and he says to the father of the minor daughter, "Is it not so?" and the father of the minor daughter says, "Yes, it is so;" and they do not add anything further to this. The learned have held that it would be better to renew the marriage contract and perform it afresh; but if they do not renew the marriage contract (and do not make the *Nikah* afresh), the marriage is valid. (The declaration here is express, but the acceptance is inferable).

922. (22.) A woman appoints a man her Vakeel (or Agent) in order that he may marry her to himself. The man goes to an assembly of witnesses and says, "You bear witness that I have verily married so and so." The witnesses are not acquainted with that 'so and so.' This marriage is not valid, unless the man mentions her name and the name of her father and of her grand-father; because what the man says amounts to his saying, "I have married a woman who has appointed me Vakeel." And if the woman is present under a veil, and the man says, "I have married this (woman)," and the woman then says, "I have given myself in marriage," this is valid; because the woman is known (or identified) by being pointed out. But an absent woman cannot be known and identified except by being named or described with reference to her descent. And if the witnesses know the absent woman, and the husband mentions her name, and nothing else, the *Nikah* is valid when the witnesses know that that woman is intended.

923. (23.) It is said by Khussaf, on whom be peace, in treating of devices, "A man asks a woman to authorise him in respect to her marriage, in order that he might marry her to himself for such a dower; the woman accordingly does so: then the Vakeel (or Agent) says in the presence of witnesses, 'I have married to myself the woman (without describing or naming her) who has given authority to me in the matter of her marriage, for so much dower,' and the man is her *Koofoo*, or equal in rânk: this is valid marriage." And Shumshool Aymma Hulwaee, on whom be peace, says, "This is what Khussaf has laid down; but according to what our Mashaikhs, or learned Doctors, and the Mashaikhs of Balkh, on whom be peace, say, the 'marriage is not valid unless the woman's name and her descent are mentioned.'" And Shamshool Ayma Sarukhsee, on whom be peace, says, "Verily Khussaf was great in learning, and it is permissible to follow him." And also Hakim Shuhood, on whom be peace, says

in his Moontaka (in concurrence with us) as said by Khussaf, as regards a girl who was known by a particular name in her infancy, but who is known by a different name when she grew up, "It is not valid to give her in marriage by her first name, when she has come to be known by the other name."

924. (24.) A woman makes a man her Vakeel (or Agent) in order that he might give her in marriage. The man gives her in marriage, but makes a mistake in the name of her father: the marriage is not valid, if the woman is absent (*i.e.*, not present in the assembly, but if she be present in the assembly, her identity being clear, and she could be known by being pointed out, the *Nikah* in that case would be valid.)

925. (25.) A man has an only daughter whose name is Ayesha. He (the father of the girl) says, at the time of giving her in marriage, "I have married to thee my daughter, Fatima." No marriage is established between them (*i.e.*, between Ayesha and the person addressed). And if the woman was present, and the father then said, "I have married to thee this my daughter, Fatima," pointing towards Ayesha, making a mistake in her name, and the husband then said "I have accepted:" the marriage is valid.

926. (26.) A man has an only daughter: he gives her in marriage to a man saying, "I have given in marriage to thee my daughter" without naming her; the husband then says, "I have accepted:" the marriage is valid.

927. (27.) A man has two daughters; the elder of the two is named Ayesha and the younger Fatima. The father in the marriage of the elder daughter, says, "I have married to thee my daughter, Fatima." The marriage is valid as regards the younger. But if he says, "I have married (to thee) my elder daughter, Fatima" and the husband says, "I have accepted;" the learned Doctors have held that the marriage is not valid as regards either of the two.

928. (28.) And Sheikh Ool Imam Aboo Bukur Mohamed, son of Fuzul, on whom be peace, has said, "When in marriage, the name of the absent man (the bridegroom) with the *Koonneut* of his father (*e.g.*, the father or son or uncle, of so and so) is mentioned, instead of the name of the father, then if the husband is present (in any other part of the room, and is capable of being pointed out), and has been (identified by being) pointed out, the marriage is valid: but if the husband be (totally) absent (and is not spoken of by being pointed out), then the marriage is not valid

until his name and that of his father and grand-father are mentioned :" and he also says, "It is better, in order to be on the safe side, that he should be described with reference also to the *Mohullah* (the quarter he lives in) :" then he (the Sheikh abovenamed) was asked, "If the absent husband is known to the witnesses (what then; that is, is it then also necessary to name the place of residence?);" and his answer was, "Although the husband be known (even then the *Mohullah* should be mentioned), because it is necessary that the marriage should be with reference to him (and he should be fixed with the marriage)." And verily have we quoted from others as authority for the proposition that in the case of an absent woman, if the husband mentions her name (only) without any other description, and the woman is known to the witnesses, then the *Nikah* is valid. (See the latter part of paragraph 22.)

929. (29.) A Vakeel (or Agent) on behalf of a man says to the father of the girl, "Have you made a gift of (that is given in marriage) your daughter to me," and the father of the girl says, "I have made a gift:" then the Vakeel says in answer, "I have accepted." Then the Vakeel makes a declaration that he has accepted the marriage for his client, but that he had concealed that fact before, and made no specification (whether he had made the acceptance on his own behalf or on that of his client) : the learned doctors have held that if this proposal is made by the Vakeel under circumstances shewing that he acted as a negotiator for the purpose of negotiating the marriage, and if the father also accepted on the basis of such negotiation and not by way of a contract of marriage, then this will not amount to marriage, either with the Vakeel himself, or his client; but if their speech was by way of contracting a marriage, then the marriage is obligatory on the Vakeel (himself personally).

930. (30.) The author of the Jamai Asghur says, "A man sends a number of persons to the father of a woman for the purpose of negotiating a marriage: the father of the woman says, 'I have given in marriage.'" He (the author of Jamai Asghur) says, "This will not amount to a marriage; because all of them were directed to negotiate, whether any of them speaks or not: thus the marriage remains without witnesses: and the same is not valid unless the husband is himself present, when the (aforesaid) number of persons become witnesses." But some other lawyers have held that the marriage is valid in both cases (whether the husband be present or not); because it is ordinarily understood in such a case

(when a number of persons are sent for such a purpose) that the marriage shall be performed (and proposed on behalf of the husband) by any one of them whoever he might be.

931. (31.) The following is reported from Aboo Hufs Safkurduree, otherwise called Safkudry, otherwise called Sakurdury. A man asks another man that the latter should give his daughter in marriage with the son of the former: the father of the daughter says, "I have made a gift of her (given her in marriage) to thee," then the father of the boy says, "I have accepted:" (in this case) the daughter shall become married to the father (of the boy) and not to the son; but if the father of the daughter had said to the father of the boy, "I have made a gift of her (given her in marriage) for (or on account of) thee," and the father of the boy said "I have accepted," then the marriage will be contracted with the boy, because the meaning of the expression "I have made a gift of her *for* thee" means "on account of thee." And an example of this case (where, although the father of the boy came to contract the marriage for his son, still, on account of the expression used by the father of the girl, the marriage came to be binding on the father of the boy himself) might be cited from what Mohamed, on whom be peace! says in his work on Jamai Kubeer, whilst discussing the rules where *Shoofa* (pre-emption) becomes abandoned. He (the said Mohamed) says that Natefee, on whom be peace, has said, "When a man says to another, 'I have come to thee to negotiate a marriage with thy daughter;' and the father says, 'I have made thee master (of my daughter):' this will amount to marriage (with the person who had so come as aforesaid)."

932. (32.) A woman says to a man, "I have rendered myself for thee (*Jaalto luka*) for a thousand dirhems," in the presence of witnesses; the man says, "I have accepted:" this amounts to a marriage.

933. (33.) A man says to a woman in the presence of witnesses (in the Persian) "Hast thou given thyself to me" without saying "Given thyself as wife;" the woman says "Given" without saying "I have given." Or if, in the marriage of a woman, a man were to be addressed "Hast thou accepted this *Nikah*?" and the man were to say, "Accepted," without saying "I have accepted:" the learned have said that this is valid. And similarly if between parties the transaction of sale is going on and the vendor says, "I have sold this slave for a thousand dirhems" and the vendee says, "I have purchased:" this is valid although the vendor has not said,

"I have sold to thee." And similarly, if the woman says, when asking for a divorce (*Khoola*), "I have purchased myself; have you sold?" and the man says, "Sold:" this is valid, although the woman did not say, "I have purchased myself *from thee*," and the husband did not say "*I have* sold."

(See paragraph No. 13. Where a similar expression addressed to the father of the girl is held not to amount to marriage. What is meant in paragraphs 13 and 33 is this:—If the father of the girl, or if the girl herself were to be addressed, so that the word "Given" is used, then inasmuch as this word is capable of two constructions; one, that mere negotiation was meant; and the second, that the actual marriage was meant. If the intention, by the use of the word, is to negotiate, then in both cases there would be no marriage whether the father or the girl was addressed; but if the intention was marriage, then in both cases marriage would be effected. See Fatawai Alumgiree, Vol. I, p. 383, lines 1 and 2: and our author has said in paragraph 13, that there will be no *Nikah*, and in paragraph 33, that there will be *Nikah*, because the word "Given" when used to the father *primâ-facie* implies negotiation, and when used to the girl herself, *primâ-facie*, imports proposal of marriage.)

934. (34.) A man seeks to give in marriage his minor son with a minor girl: the father of the minor girl says, "I have given in marriage my daughter with thy son:" The father of the minor son says, "I have accepted." This is valid (marriage of the minors) although he did not say "I have accepted for my son:" because the answer ("I have accepted") incorporates (or implies) what is in the question.

935. (35.) A man negotiates for the marriage of his minor son with a girl. When the father of the boy and the father of the girl meet, the father of the girl says in Persian, "I have given to thee as wife this daughter, for a thousand dirhems;" and the father of the boy says, "I have accepted:" this will amount to a marriage with the father of the boy; because he (the father of the boy) attributed the marriage to his own self (by saying "I have accepted"), although the negotiation between them had taken place in respect of the boy. (Here there was nothing in the question which could be implied in or incorporated with the answer.)

936. (36.) A man says to another, "I have come to thee to negotiate a marriage with thy daughter;" or he says, "Give in marriage to me thy daughter;" or he says, "I have come to thee in order that thou might give thy daughter to me in marriage." The father (of the girl) says, "Verily

have I given (her) to thee in marriage;" or he says, "I have made thee her master:" here marriage is binding (although the man did not say "I have accepted," because the father of the girl here must be supposed to have acted for both sides).

937. (37.) As to whether marriage is constituted by words importing a bequest. If the father of the girl says, "I have bequeathed my daughter to thee *at present*," in the presence of witnesses: and then the man says "I have accepted:" this will amount to a marriage; but if he says "I have bequeathed my daughter to thee *after my death*," this will not amount to marriage; whereas if he says, "I have bequeathed my daughter to thee," without adding anything further (whether "at present" or "after my death"), and the man says, "I have accepted," this will not amount to marriage. (See p. 383, lines 18 and 19, Fatawai Alumgiree, Vol. I, where it is stated that words of bequest are not capable of constituting marriage; because by bequest property in the thing arises after death: but be it observed that by the use of the word "*at present*," the sense of bequest that it should take effect after death is modified).

938. (38.) The imperative form in the matter of marriage is (effectual) for proposal, and we have said so before. (See para. 3). (The reason is, that the party to whom the imperative form is addressed is constituted a Vakeel or Agent on behalf of the speaker, so that the person addressed acts on behalf of both parties. For instance, when the woman says to the man, "Give me in marriage to thyself," and he says, "I have given thee in marriage to myself:" this amounts to "I have given thee in marriage to myself, and I have accepted the marriage;" the same person therefore in effect makes the proposal as agent and makes the acceptance on his own behalf: so also a third party can act both on behalf of the husband and the wife. In matters of marriage, the same person can act on both sides; because the contract is referable to the principals, and cannot possibly be referred to the Vakeel himself: but in cases of sale, one and the same person cannot act for both sides; because *primâ-facie,* he is the contracting party and responsible to the other party to the sale: if, therefore, the same person could be allowed to act on behalf of both parties, he would combine in himself the duty of demanding, and the obligation of being liable for the purchase-money, and that is unreasonable.) And in the same way the imperative form is (effectual) in matters of divorce. When the woman says, "Divorce me for a thousand (dirhems),

and the man says, "I have divorced:" the divorce is complete. (Here the husband did not say, "I have divorced *thee*;" but simply said, "I have divorced," still the divorce is complete; because the woman's expression "Divorce me," shews to whom the answer is referable.)

And in the same way in *Khoola* (the imperative form is used as a proposal to get divorce). And also when a man says to another "Be surety to me for the person of such and such a man;" or he says, "Be surety to me for that which is owing from such and such a person (to me)," and then the other man says, "I have become surety;" the suretyship is complete. In the same way, if a man says, "Give me this slave," and the other man says, "I have given," (the gift is complete). And if the donor says as a beginning, "I have given to thee this," the gift is not valid until the donee says, "I have accepted." But if the vendor says to the vendee "Surrender (or dissolve) the sale," and then the vendee says, "I have surrendered," the surrender (or dissolution) is not valid until the vendor says, "I have accepted (the surrender)." Aboo Yusoof, on whom be peace! says, the surrender is complete although the vendor does not say, "I have accepted." And if a man says, "I have made a gift (*Sudka*) of this to thee;" then, according to Aboo Yusoof, the gift is complete without acceptance. And if the debtor says to the master of the debt (the creditor), "Release me from the debt," and the creditor says, "I have released thee;" the release is complete. And if the master of the debt (the creditor) says to the debtor by way of a beginning, "I have released thee from the debt which is owing to me from thee;" the release is valid without acceptance; but if the debtor refuses to accept the release, the release becomes void (*batil*). But the release by a person of the surety does not become void by the refusal of the surety to accept the release (*i. e.*, the release of the surety is complete although the surety refuses to accept the release). In the same way, the validity of *Vukalut* does not depend on acceptance; but if the Vakeel refuses to accept, the power becomes void (*batil*). And admission (*Ikrar*) does not depend for its validity on acceptance, but it becomes void (*batil*) by refusal. If a man makes *Wakf* of land on a man and his *Nusul* (children), and the man on whom the *wakf* is made says, "I do not accept (the *wakf*)," there is difference in this case (whether the *wakf* is valid or not). Hilal, on whom be peace! says, "The *wakf* is void (*batil*);" and Ansary, on whom be peace! says, "The *wakf* is valid, and it does not become void (*batil*) by refusal to accept."

939. (39.) The acceptance of marriage must take place at the same meeting as in the case of acceptance of sale. A man says, in the

presence of two witnesses, "I have married so and so:" (that constitutes one *mujlis* or meeting); then the intelligence reaches her (although it may be) in the presence of the (same) two witnesses, and she accepts (the marriage); (that is, another *mujlis* or meeting.) This is not valid according to the saying of Aboo Haneefa and Mahomed, on whom be peace! (because proposal and acceptance are not made in the same *mujlis* or meeting). But if the man sends an ambassador to the woman, or if he writes to her a letter, saying, "Verily have I married thee for so much," and she accepts (the marriage) in the presence of two witnesses, then if the witnesses hear what the ambassador says, or if the letter has been read in their presence, and she then accepts, this is valid (marriage); (because the ambassador's speech or the reading of the letter amounts to a proposal, and the woman accepts it in the same meeting); but if the witnesses have not heard what the ambassador has said, or if the letter has not been read in their presence, and the woman accepts, this is not valid (because the proposal has not been heard by them). But Aboo Yusoof, on whom be peace! says, this is valid. (Unity of *mujlis*, meeting or assembly, depends on two things,—unity of place, and unity of occupation: the declaration or proposal and acceptance must be at the same meeting as regards the bridegroom and the bride; both should be at the same place, and nothing else should occupy their attention: but there might be unity of meeting actually, as when the parties are actually present at the same place, or it might be so not actually, but in spirit and to all intents and purposes; as in the case of the ambassador going to the bride's house, or the letter being taken to her, when the meeting is in her house, and the ambassador or the bearer of the letter represents the bridegroom, and the bride being present, there is unity of meeting though not actually, but in spirit and to all intents and purposes. See Fatawai Alumgiree, Vol. I., p. 380, line 1, &c.)

940. (40.) *Marriage is not contracted by the (use of the) word Mootah* (a term implying temporary marriage: literally it means to derive benefit, but technically it imports marriage for a term of years.) A *Mootah* marriage is void (*batil*) according to us (followers of Aboo Haneefa) not being capable of legalising connexion; although Ibn Abbas and Malik, on whom be peace! take a contrary view. The explanation of *Mootah* is as follows:—That is, when a man says to a woman, "I have contracted *Mootah* with thee for such and such property, (*i. e.*, for so much dower,) for such and such period," and the woman consents (or expresses acceptance): this does not legalise connexion, and it is not susceptible

of *Talak*, or *Eela*, or *Zihar* (these being three forms of divorce), and one of the parties will not inherit from the other: so also when the husband says, "I have married thee by way of *Mootah*," (*i. e.*, the contract will not be valid). But it is reported from Aboo Haneefa in the Harooneeat, that this will be sufficient to effect the contract of marriage (*Nikah*); (because the word "married" is used and no time is fixed); the words "by way of *Mootah*" being surplusage. And if he says, "I have married thee for one month" and the woman consents, then, according to us (the followers of Aboo Haneefa), this is *Mootah* and not marriage (or *Nikah*), (and the result is, that the connexion is not legalised): but Zoofar, on whom be peace! says (in this case) the marriage (or *Nikah*) will be valid, and the condition will be void (that is, the words "one month" will be considered surplusage) in the same way as if a man marries with a condition that he will divorce her after a month; in which case the marriage (or *Nikah*) is good, but the condition is void: and in the same way as if he says, 'I have sold this to thee in consideration of this, by way of "Tuljeea," in which case the sale is good and the condition is void. (As to Tuljeea, see Mohamedan Law of Sale by Baillie, p. 304, and Digest, p. 505. Fatawai Alumgiree, Vol. VI, p. 598, last line but one, and Ruddool Moohtar, Vol. IV, p. 379, line 10.) And Hussun, son of Zyad, on whom be peace! says, if the husband and wife mention a period such that they will not live beyond that period, the *Nikah* will be valid, because there is perpetuity to all intents and purposes: but if they mention a period such that they will live beyond it, the *Nikah* will not be valid, because that is confining the marriage to a period: but according to us (the followers of Aboo Haneefa) all these are equal, (*i. e.*, no valid *Nikah* will be contracted by the mention of any term long or short).

941. (41.) A man marries a woman by using Arabic expressions, or by using expressions of which he does not know the meaning, or a woman gives herself in marriage using such expressions; then if they know that the expressions are such that marriage is contracted thereby, the marriage is valid according to all: and if they do not know the meaning of the expressions, and also do not know that the expressions are such that marriage is contracted thereby, then such a contingency (that is, the person's ignorance of the meaning and import of the words used) might arise in regard to cases relating to divorce or manumission generally (*Itak*), or manumission made dependent on death (*Tudbeer*), or marriage, or *Khoola*, or release from right, or from sale, or making a person owner (*Tumleek*):

and divorce and manumission generally (*Itak*) and manumission made dependent on death (*Tudbeer*) will be effected: it is so laid down in the Asul (that is, the work of Mohamed) in the Chapter on *Tudbeer* in the Book on *Itak*: and when the rule is known in the case of divorce and manumission, then it is proper that the same rule should hold good in the case of marriage, because a knowledge of the meaning and import of a word is necessary only to infer intention: and the same (*i. e.*, the knowledge of the meaning and import of the word) is therefore not a necessary condition where use of expression with intention and use of expression by way of (*Huzal*) joke stand on the same footing, (as in the case of marriage, which is effectually contracted whether expressions are used with the intention of contracting a marriage or used merely by way of joke without the intention of actually contracting the marriage: in three things intention or *jidd* must be taken for intention and joke or *Huzal* must also be taken for intention, *viz.*, marriage, manumission and divorce), contrary to the case of sale and other similar matters (such as release and *Tumleek* which will not be effectual otherwise than with intention).

Now as regards the *Khoola* form of divorce. If a man tutors his wife to say, "I have freed my person from thee for the consideration of my dower and of my maintenance during my *Iddut* (or term of probation)," and the wife says so (or repeats those words without understanding their meaning), the learned have disagreed in this matter. Some of them have said if she does not know the meaning of the words or does not know that these words are words of (*i. e.*, which cause) *Khoola* amongst people, (*i. e.*, that people know that these words are words used for *Khoola*,) then *Khoola* is not valid: and this is correct: and the author, (*i.e.*, Moulana Kazi Khan) says it is proper that in this case *Talak* should be effected, but the husband shall not be released from the dower and maintenance during *Iddut* in the same way where the husband makes *Khoola* with his wife who is a minor, and the wife accepts the *Khoola* when, (*i. e.*, in this latter case) a *Talak* will take place (although the minor labours under a disability) and the dower and maintenance will not drop, (*i. e.*, the right to dower and maintenance will subsist). So also (the right to dower will not cease to exist) if a person tutors his wife to release her husband from dower by using Arabic expressions (and the wife uses such expressions, of which she does not understand either the meaning or the import). And in the same way when the debtor tutors his creditor to use expressions of release (of which the creditor does not understand the meaning or import) there will be no release (of the debtor in respect of the debt).

942. (42.) A man says to a woman, "I have married thee for so many dirhems" in the presence of witnesses: the woman then says, "I have accepted the marriage (*Nikah*), but I do not accept the dower;" or a man says to another man, "I have given in marriage my daughter to thee for so much dower," and the other man then says, "I have accepted the marriage (*Nikah*), but I do not accept the dower." The learned have held that the marriage is not valid: on the other hand such a marriage is void (*batil*). But if the woman says, "I have accepted the marriage (*Nikah*)" and keeps quiet regarding the dower, the marriage is valid for such dower as was mentioned (by the person who proposed the marriage). (See Fatawai Alumgiree, Vol. I., p. 380, line 15, where this instance is cited to illustrate the principle that the acceptance must be in terms of the proposal).

943. (43.) The following is laid down in the Moontuka:—A slave marries a woman, giving his own person (as dower), and he does so without the permission of his master: the master then receives the intelligence and says, "I permit (*i. e.*, ratify or recognise) the marriage, but I do not permit the person (of the slave as dower): the author of the Moontuka says, the marriage is valid, and the woman shall be entitled to what is the lowest of the *Meher-Misl* (proper dower), and of the price of the slave (*i. e.*, she shall be entitled to the lower of the two amounts), and the like ruling is laid down (by Mahomed) in the Jamai, where he says, a female slave contracts her marriage without the permission of her master for two hundred dirhems; the master then receives intelligence thereof, and he says, "I have allowed (or permitted) the marriage for fifty dinars," and the husband agrees to this: this marriage is valid; and the learned have assigned as a reason for the validity of the *Nikah* that what the master says does not amount to setting aside (or vetoing) the marriage, but it amounts to setting aside the dower named; but the setting aside of the dower named does not amount to setting aside the marriage, because a marriage is (validly) contracted without dower being named; therefore it is proper that (in the case supposed) the marriage should remain good without the dower named (*viz.*, two hundred dirhems) being allowed to remain good.

944. (44.) A man says to a woman in the presence of two witnesses, "I have married thee for so much (stating the amount), if my father permits (the marriage), or if he consents to it;" and then the woman says, "I have

accepted:" this marriage is not valid; because it is a conditional marriage, and marriage does not admit of being made dependent on a condition. But if he says, "I have married thee on condition that I shall have the option," the marriage will be valid, but the option will not hold good; because the husband has not made the marriage dependent on a condition, but he has contracted the marriage (absolutely) and has stipulated for option, and the condition for option is void (*batil*).

945. (45.) A *man marries a woman on the understanding that he is a* resident of a city (*Madunee*); then, if he is a villager (*Kurwee*), the marriage is valid, if he is of the same *Koofoo* (or rank): the woman has no option in the matter (by reason of his turning out a villager).

946. (46.) A man demands (*i. e.*, proposes) marriage with a woman in the presence of witnesses; the woman then says, "For me there is (already) a husband;" and then the man says, "There is no husband to thee;" on which the woman says, "If there is no husband to me, then verily have I given my person in marriage to thee;" the husband (that is the man) makes the acceptance, and the fact is she had no (previous) husband: the learned have said, this marriage is valid, because the making (a thing) dependent on a condition, which is merely expressive of what is already in existence, is (not conditional at all but is) effective at once (compare paragraph 44, where the marriage is dependent on the will of the father and that is a condition in form and in reality, because the consent of the father might or might not be given; but if the marriage is conditional in form only but not in reality, *e. g.*, where the marriage is made dependent on a condition in this way, that is, "if the sky is above the earth," then *the marriage is not* conditional at all: in the instance given, the fact was that the woman had no husband; therefore her making it conditional, by saying if she had no husband, does not render the marriage dependent on a condition; on the no other hand, it is *Tanjeez* or effective instantly).

947. (47.) There are two infant hermaphrodites, the father of one of them says to the father of the other, in the presence of witnesses, "I have given in marriage this my daughter to this thy son," and the other accepts. It then appears that the infant who was supposed to be a girl is (in reality) a boy, and the infant who was supposed to be a boy is (in reality) a girl: the marriage is valid. (See Fatawai Alumgiree, Vol. I., p. 381, line 13). And this is an illustration of what we have mentioned (see paragraph 9), where the man renders his own person as the object of the marriage.

(That is to say, the object, or *Muhul*, of the marriage is the woman, and in the instance given, the supposed girl was the object on which marriage was sought to be operative; but if the girl turns out to be a boy, the marriage is still valid; because, as in paragraph 9, the person of the man could also be the object on which marriage could be operative. Therefore there is no objection against the validity of the marriage on the ground that the girl was understood to be the objective in the marriage contract, when the man uses an expression which is referable and applicable to himself as principal according to the meaning of that expression).

948. (48.) Marriage is not contracted by the use of the word *Ikalu* (surrender, or giving up of sale); nor by the word *Khoola* (denoting a form of divorce); nor by the word *Sooleh* (compromise); nor by the word *Baraut* (release).

949. (49.) If the husband refers the marriage to half of the person of the woman, then in this case there are two views (traditions); but the (more) correct of the two views is, that the marriage shall not be valid in consequence of a combination in one and the same person (that is, in the person of the wife), of two contradictory things, *viz.*, permissibility (by way of enjoyment) and forbiddenness (at the same time): preference should therefore be given to what is forbidden. (See Fatawai Alumgiree, Vol. I., p. 380, lines 21 to 24).

950. (50.) And marriage is contracted by one word (*i. e.*, by the expression used by one person only) when the person causing the marriage to be contracted (*i. e.*, when the giver in marriage) is the guardian of both minors, as when he is the grandfather of both, or paternal uncle of both, and he says, "I have given in marriage so and so to so and so." So also when a man says, "I have given in marriage my daughter so and so to the son of my brother (my nephew) so and so" (that is, when the same man is the guardian of both). So also when the Kazee says, "I have given in marriage this female minor to this male minor." So also when the master gives his female slave in marriage to his minor male slave. So also when the emancipator (*Motik*) gives in marriage one who was his female slave (*Motukah*) to a male minor who was his slave (*Motuk*) (there being no other guardian). (Here the female, who was his slave, must be supposed to be a minor; because if she is of age, and has been emancipated, she is free to contract her own marriage: but if she is a minor, then the emancipator ranks with the residuaries in the matter of guardianship in

marriage). So also when one and the same person is the *Vakeel* (or agent) on behalf of both parties; or when one and the same person is the guardian of one party, and *Vakeel* (or agent) on behalf of the other party; or when he is the guardian of one party, and is himself, as principal, the other party, and as such says, "I have given in marriage the daughter of my paternal uncle so and so to my own self," or when a man, who is the emancipator of a female minor, says, "I have given in marriage this female minor to my own self," or when he is the *Vakeel* (or agent) on behalf of a woman, and gives his female client in marriage to his own self; or when a woman is *Vakeel* (or agent) on behalf of a man, and she says, "I have given in marriage my own self to so and so." Verily in these instances, the marriage is contracted by one word (*i. e.*, by an expresson pronounced by one and the same person alone), and one and the same expression constitutes proposal and acceptance.

Sheikh-ool-Imam, known as Khahur Zada (sister's son), on whom be peace! says, "this is (the rule) (that is, the marriage shall be contracted by the expression of one and the same individual alone) when he uses an expression which is referable to himself as principal (according to the meaning of that expression); but when he uses an expression so that he is merely an agent in accordance with the meaning of that word, then one word (or word of one and the same person alone) will not be sufficient: and the illustration of this principle is, when a man gives a woman (who has appointed him her agent) in marriage to his own self, if he says, 'I have given in marriage so and so to my own self,' then one word will not be sufficient; because in the act of 'giving in marriage' he is an agent: but if he says, 'I have married so and so,' this is valid; because in the act of 'marrying' he is the principal (or, in other words, the use of the word, 'Marry' is referable to himself as principal)." (See Fatawai Alumgiree, Vol. I., p. 421).

951. (51.) The following is reported from Aboo Yusoof:—A man says to a woman, "Give thyself in marriage to me for a thousand," the woman says, "I will not do so except for two thousand:" The man then says, "Fear God and fear Him:" the woman then says, "Verily have I done" (*i. e.*, I have accepted the marriage). This is valid (because her expression means acceptance of marriage and not that I fear God). And Mahomed, on whom be peace! says the same thing.

952. (52.) Marriage is contracted by the word of a minor, but it

is dependent on the permission of the guardian, if the contract is such that the guardian is the master of it (that is, if the contract of marriage is of such a nature that it is capable of being ratified by the guardian, *e. g.*, if the marriage is not within the prohibited degrees, and so forth). For instance, when a male minor marries his female slave, the contract of marriage is effected, but it is dependent on the permission of the guardian.

953. (53.) When a man says to a woman, "I have married thee for a thousand if so and so consents (to the marriage);" then Aboo Yusoof, on whom be peace! says in his work called the Amalee, "if that so and so is present at the meeting and consents, the marriage is valid by way of *Istihsan* (reasoning from analogy); but it will not be valid if that so and so is absent although he consents afterwards, (because marriage does not admit of a condition; so that if that so and so is present and if he consents, there is, in reality, no condition or *Taleek*, but the case resolves itself into one of *Tunjeez* or the giving immediate effect to the marriage.")

SECTION II.

MARRIAGE WITH CONDITIONS.

954. (54.) A man marries a woman on condition that she is divorced, or on condition that her authority in the matter of divorce is in her hands. Mahomed, on whom be peace! says in his work called the Jamai, that the marriage shall be valid, but the divorce is void (*batil*), and the authority (in the matter of divorce) will not be in her hands. It is laid down in Books of Rulings or Fatawai from Hussun, son of Zyad, that when a man marries a woman on condition that she is divorced after ten days, or on condition that the authority (for divorce) is in her hands after ten days, the marriage is valid and the divorce is void: and she will not be the mistress of her authority. And the lawyer Aboo Lais, on whom be peace! says, this is the rule (*i. e.*, the marriage is valid and the condition mentioned above is null), when the beginning is made by the husband (*i. e.*, when the proposal comes from the husband) and he says, "I have married thee on condition that thou art divorced:" (In this case the condition is void). But when the beginning is made by the woman (*i. e.*, when the proposal comes from the woman) and she says, "I have given myself in marriage to thee on condition that I am divorced" or "on condition that the authority (in the matter of divorce) is in my hands, so that I may divorce myself whenever I choose,"

and the man then says, "I have accepted," then (in this case) the marriage is valid and the divorce will be caused or the authority (in the matter of divorce) will be in her hands (as the case may be according to the condition). The reason is this, when the beginning is made by the husband, then the divorce or delegation of authority is before the marriage has been contracted (*i. e.,* whilst the parties are not husband and wife): therefore the same (the divorce or the delegation of authority) is not valid. But when the beginning is made by the woman, then the (divorce or) the delegation is after the marriage, because the husband, after the woman has already expressed herself, says, "I have accepted," and the answer involves the reiteration of what is included in the question: therefore what the husband says amounts to this, "I have accepted on condition that thou art divorced, or on condition that the authority (in the matter of divorce) is in thy hands." Therefore the husband becomes the giver (of the divorce or) of the authority after the marriage.

[NOTE.—There are two rules which bear on this principle: the first is obvious, that a person cannot divorce anyone but his wife; therefore divorce to be effective must be operative after the relationship of husband and wife has been established: so also the delegation to the wife of the authority to divorce herself must be after marriage. The second rule is, that divorce is the act of the husband: he alone has the power to divorce the wife: the wife cannot divorce the husband, but he can delegate to the wife the authority to divorce herself. Bearing in mind these two rules, the instances given in the text are clear. When the proposal for marriage comes from the husband, the marriage contract is not complete until the wife pronounces expression of acceptance. Therefore, when the husband couples with his proposal of marriage, a divorce or delegation of authority to divorce, this divorce or delegation has been uttered by him whilst the marriage is not complete, and whilst the woman is a stranger. But when the proposal comes from the woman coupled with expression of divorce or delegation, then as soon as the husband expresses acceptance, this acceptance completes the marriage, and it also implies expression by the husband of words of divorce or delegation of authority; and inasmuch as the divorce or delegation thus becomes the act of the husband, the divorce or the delegation is complete and is found after the marriage has been established, and is therefore valid. But when the proposal is by the husband then although he has coupled the proposal with divorce or delegation of authority to divorce, still the divorce or delegation is found befor

the marriage; and although, as in the other case, the acceptance by the woman implies all that has been stated in the proposal, still it would not be sufficient to cause divorce or to delegate authority: the divorce or delegation being the act of the husband and not of the wife, the wife's acceptance, though after marriage, has no effect; and it is obvious that the husband's act was at a time when there was no marriage. From this discussion it is clear that if the husband's proposal makes mention of divorce or delegation of authority in such a way as to have effect after the marriage relationship shall have been established, then the divorce or delegation would be effective, although the proposal comes from the husband, and this will be found illustrated in the text in paragraph 56.]

955. (55.) And in the same way when the master gives his female slave in marriage to his male slave, if the male slave begins and says, "Give this thy female slave in marriage to me for one thousand on condition that her authority (in the matter of divorce) shall remain with thee, so that thou shalt divorce her whenever it pleases thee," and the master gives her in marriage to him, then the marriage shall be valid, but the authority (in the matter of divorce) shall not vest in the master. But if the master begins and says, "I have given in marriage my slave girl to thee on condition that the authority in the matter of divorce shall remain in my hands, so that I shall divorce her whenever it pleases me," and the male slave says, "I have accepted," the marriage shall be valid, and the authority in the matter of divorce shall remain in the master. (See Towzeeh, pages 125 and 181, and Shuruh Vikayah, Vol. II., page 61).

956. (56.) And from all this (that is from what has preceded in paragraphs 54 and 55) the learned have held that if a woman, who has been thrice divorced, intends to marry a Mohullil (a stranger, marriage to whom and subsequent divorce by whom is a condition precedent to the legality of the marriage of the woman with her former husband), but is afraid that he might not divorce her, the device which she might adopt in such a case is, that she should say, "I have given myself in marriage to thee on condition that my authority (in the matter of divorce) shall be in my hands, so that I might divorce myself whenever I choose:" then if the husband (the Mohullil or stranger aforesaid) accepts (this proposal), the authority (to divorce) shall remain in her hands after the marriage, so that she shall be at liberty to divorce herself whenever it pleases her. Or (the device is) that the *Mohullil* (or stranger) should say, "I have married thee on condition that thou shall be divorced

after ten days after I shall have married thee," or "on condition that thy authority (to divorce) shall be in thy hands *after I shall have married thee so that thou shalt divorce thyself whenever it pleaseth thee :"* then if the woman say, "I have accepted," she shall be divorced after ten days (in the first case) and the authority (to divorce) shall remain in her hands (although in this case the proposal comes from the husband, still by the effect of the words in italics, the divorce, or the delegation, is operative after marriage. Here also the difference between this case, where the husband makes the beginning, and the divorce is effective, and the illustration given by Hussun, son of Zyad, in paragraph 54, where the husband also makes the beginning and the divorce is inoperative, must be noted. In the illustration of Hussun, the divorce is not effective, because the husband simply said "ten days after" instead of saying "ten days after *marriage.*" The divorce must be pronounced either at a time when the marriage relationship is already established, or it must refer to what is the cause of that relationship, *viz.*, marriage. In the present case, the husband makes a beginning, but he refers the divorce to a period "after ten days *I shall have married thee,"* and not simply "ten days after.")

957. (57). And in the same way if the slave says to his master, "When I shall marry her (a woman), then her authority (to divorce) shall be in thy hands for ever ;" and then the slave marries her, the authority (to divorce) shall be in the hands of the master, and it shall not be possible for the slave to take away that authority from the master at any time. (Here the condition is made dependent on the cause of the marriage).

958. (58). A woman who has been divorced by her husband, is desirous that he should marry her (again). The husband says, "I will not marry thee, until thou shalt make a gift to me of that which I owe to thee, for thy dower." The woman then makes a gift of her dower, on condition that he should marry her : He then refuses to marry her. Abool Kassim Suffar, on whom be peace! says, the gift is void (*batil*) whether the husband fulfils his condition (to marry) or not; because she has constituted her property as consideration in favor of the husband for his marrying her, and in marriage the consideration is not obligatory on the woman. And Khuluf, on whom be peace, says, the gift is valid whether he marries her or not : and examples of a like nature will come (to be discussed) in the book on 'Gifts.'

959. (59). And Abool Kassim Suffar, on whom be peace, says, when a man marries a woman on condition that he should capture and restore to

her a fugitive slave, the marriage is valid, and she shall be entitled to the proper dower (the reason being that the dower should be the property of the husband, and the run-away slave is already her property; so to bring him back cannot be considered property, or *mal*, and cannot constitute dower).

960. (60). And Abool Kassim Suffar also says, when a man marries a woman on condition that she is a virgin (that is, had no previous connexion); but the man finds her not so, still he is liable for the whole of the dower; because dower is not opposed to virginity, for the woman becomes entitled to it by the contract of marriage.

961. (61). A man marries the female slave of another on condition that all the children she shall give birth to will be free; both the marriage and the condition are valid; because if the condition had not existed, the children would have been slaves (following the status of the mother). Therefore the condition is conducive to a result (and is not abortive).

962. (62). A man marries a woman for (a dower of) two thousand *dirhems* if she be handsome, and for one thousand if she be ugly. The learned have said that, according to the opinion of all, the marriage is valid, and both the conditions (are valid): so that if she is handsome, the dower shall be two thousand *dirhems*; and if she is ugly, the dower shall be one thousand: because there is no uncertainty as to the dower, for she is either ugly or handsome: Contrary to the case, when he marries her on condition of (her dower being) one thousand if he should remain with her in her town, and on condition of (the dower being) two thousand if he should take her out of her town: because verily the second condition (*i. e.*, if he should take her out of her town) is not valid according to Aboo Haneefa, on whom be peace! because in this place (*i. e.*, in the event of the second condition) the dower is made dependent on the existence of that which is not found at the time of the marriage contract, and therefore the statement of dower is not correct. But it must be noted that the reason assigned (by Aboo Haneefa) causes difficulty in the case where the husband marries her for one thousand *dirhems* if he has no other woman (wife), and for two thousand if he has another woman (wife): in this case, the second condition is not correct according to Aboo Haneefa, on whom be peace! although the condition is existent (*i. e.*, not made dependent on an uncertain thing) at the time of the marriage. (See Futawai Alumgiree, Vol. I., p. 434, and Shuruh Vikaya, Vol. 2, p. 30.)

963. (63). A woman has been divorced three times by her husband: then

a man marries her with the *intention* that such *marriage* is for the purpose of her being made lawful to be married by her former husband. The traditions have differed in this matter. And the substance of the views taken is that, if she has married with the intention entertained by both parties that such marriage was with the object of her being made lawful for marriage to her former husband, but without such intention being expressed by them as a condition, the woman shall be lawful to her former husband: but if the intention that the marriage was with the object of making her lawful to her former husband has been stipulated for and expressed as a condition, and he has married her on such condition, then, according to Aboo Haneefa and Zoofur, on whom be peace, the marriage is valid, and the woman shall be lawful to her former husband: though the stipulation of such a condition is abominable both as regards the first and the second husband; but Aboo Yusoof, on whom be peace! says, the marriage (in such a case where the condition is expressed) with the *Mohullil,* or person whose agency is sought for the purpose of her being made lawful to her former husband, is not valid, and she shall not be lawful to her former husband: and Mahomed, on whom be peace! says, the marriage will be valid with the *Mohullil,* or person whose agency is sought for the purpose of making her lawful to her former husband, but she shall not be lawful to her former husband.

And if the second husband has divorced her thrice without having had sexual intercourse with her (that is to say, in the same case where, in consequence of the first husband having thrice divorced his wife, it was necessary for the woman to marry a different person in order that she might become lawful to and fit for being married by her first husband), and then the woman marries a third husband, who has sexual intercourse with her, then she shall become lawful (and fit to be married) to the first or second husband (because it is a condition that the second husband must have sexual intercourse with the woman in order that the latter should be fit and lawful to be married to the first husband: but the second husband having had no sexual intercourse, his divorcing her would not render her lawful to the first husband).

And if he (the second husband) is *mujboob* (that is, one whose male organ has been cut off) but if the woman stays with him for a time (that is, for a sufficiently long period), and then gives birth to a child, she shall become lawful (to be married) to her first husband (in the event of the second husband divorcing her); and the parentage of the child shall be established from the person who is a *mujboob* as aforesaid.

And if the woman (who has been divorced thrice) is a minor, so that sexual intercourse with the like of her could not be had (that is to say, a minor not fit for sexual intercourse), and then a man marries her (whilst she is so under age) and has intercourse with her, then Mahomed, on whom be peace! says, if the second husband has made the two passages into one (*Afza*) she will not be lawful (to be married) to her first husband by such sexual intercourse; but if he has not made the two passages into one, she will be lawful (to be married) to her first husband; (because the second husband must have sexual intercourse in the authorised and natural way to make the woman lawful to her first husband: but if there has been *Afza*, there is no guarantee that the intercourse has been in the natural passage. As to *Afza*, see Baillie's Imamya Law, p. 26, and Ruddool Moohtar, p. 887, Vol. II., and Futawai Alumgiree, Vol. II., p. 651).

964. (64). A man marries a woman on condition that he shall pay her, by way of maintenance, every month, one hundred *dinars*; Aboo Haneefa, on whom be peace, says, the marriage is valid, and she shall be entitled to maintenance such as the like of her would be entitled to properly (that is, in a moderate way).

965. (65). A man marries a woman for a dower of one thousand *dirhems*, on condition that she will not inherit to him and he will not inherit to her: the marriage will be valid, but they will inherit to each other, and she will not be entitled but to one thousand *dirhems*, whether her proper dower be less than the same or more: (she will be entitled to the dower named, because the amount is not uncertain, and there is no *Turuddood*, or doubt, in ascertaining it).

SECTION III.

ON CONDITIONS RELATING TO MARRIAGE.

(*i. e.*, CONDITIONS ON WHICH VALIDITY OF MARRIAGE DEPENDS.)

966. (66). One of the conditions (relating to the validity of marriage) is that, according to us, there should be witnesses to the marriage. But Malik, on whom be peace, says, that the condition regarding the validity of marriage is the giving publicity to it, not that there should be witnesses to the marriage: so that if a man marries a woman in the presence of witnesses, and has stipulated for concealment, the marriage is not valid; but if he has married without the witnesses, with the stipulation (with the wife) that he will give publicity, the marriage is valid.

967. (67). The witnesses to a marriage should be such as are capable of accepting (or contracting) marriage in their own right for themselves: therefore marriage is valid by being witnessed by two male witnesses, who do not obey the directions of the law (*fasik*); or two males who are blind; or two males on whom the sentence of the law has been carried out, for falsely accusing a woman of *Zina* (*Mahdood*); or when the witnesses consist of one man and two women: but marriage is not valid by being witnessed by two women without a man, or two slaves, or two lunatics, or two male minors, or two hermaphrodites, if there is not with the two hermaphrodites a man (*i. e.*, two hermaphrodites and one man are sufficient; but even two slaves with one man, or even two lunatics with one free man, or even two male minors with one man, are not sufficient): neither is a marriage valid by being witnessed by two witnesses who are asleep, when they do not hear the words of the contracting parties.

The marriage of two Moslems is not valid by being witnessed by witnesses who are *Kafirs* (unbelievers or infidels). And the marriage of a Moslem with a Zimmee woman (*i. e.*, a *Kitabya* infidel who lives in Darool Islam) is valid by being witnessed by two witnesses who are Zimmees (*i.e.*, *Kitabya* infidels in Darool Islam, as contradistinguished from Hurubees, who are infidels in a country which is Darool Hurub), according to Aboo Haneefa and Aboo Yusoof, on whom be peace. And the marriage of Zimmees (amongst themselves) is valid by being witnessed by witnesses who are Zimmees.

968. (68). And marriage is not valid until each of the contracting parties hears the word of the other party, and until two witnesses hear the words of both the contracting parties at one and the same time (that is, both witnesses should at once hear both parties). Therefore, if one of the two witnesses hears the words of the contracting parties, and the other witness does not hear, the marriage is not valid. And if the words of the marriage contract are repeated, so that the witness who did not hear them before when the contract was first made, hears them now, but the first witness (who had heard the words of the marriage at the first contract) does not hear them now at the second contract (when the words of the contract are repeated), the marriage is not valid.

And in the same way, if the marriage takes place in the presence of two men, one of whom is deaf, so that he who is not deaf hears, and he who is deaf does not hear, then if he who is not deaf calls out in the ear of him who is deaf, or another man calls out in the ear of him who is deaf, the marriage is not valid, until both the witnesses hear at the same time.

And Kazy Imam Aboo Ally of Soogud, in his work called the "Shuruh of Syur" says, that marriage, which takes place in the presence of two men, who are deaf, is valid, although they do not hear; because the condition is the presence of witnesses and not that they should hear. But most of the learned (*Mashaikhs*) have held that in this case the marriage is not valid, and they have made it a condition that the witnesses should hear. And also Kudoory, on whom be peace, has said that the hearing of two witnesses is a condition.

And if the two witnesses have heard the words of the two contracting parties without knowing the meaning of those words, it is said by some that the marriage shall be valid: but obviously the contrary view is correct.

And it is reported from Mahomed, on whom be peace, when a man marries a woman in the presence of two Turks (who do not know the language of the contracting parties), or of two Indians, (who do not understand the language of the contracting parties), he (Mahomed) says, if it is possible for them to describe what they have heard (*i. e.*, if they can repeat the words), the marriage is valid, if not, it is not valid (that is, the case given being that the witnesses do not understand the meaning of the expressions used, but they know that what is going on is marriage).

969. (69). And it is stated in the Moontuka that if a man marries a woman, the marriage being witnessed by two witnesses, and if one of the two witnesses hears, and the other does not (the words of the contracting parties), but the husband repeats the words to him who has not heard, the author of the Moontuka says, the marriage is valid, reasoning from analogy, if the meeting is one; but if the meeting is different, then the marriage is not valid. And Hakim Abool Fazul, on whom be peace, says, that it is reported from Aboo Yusoof, on whom be peace, that the marriage is not valid until both the witnesses hear together (although the meeting might be the same).

970. (70). There is no positive text from our masters (*i. e.*, Aboo Haneefa, Yusoof and Mahomed) in (the matter of the validity or otherwise of) a marriage witnessed by two dumb men: but by inference drawn from the saying of Kazy Imam Ally of Soogud, on whom be peace, there can be no doubt that the same is valid; because, according to him, the condition (of the validity of a marriage) is the presence of two witnesses and not that they should hear: whilst the inference from what others besides him have said, the rule would be that if the dumb witnesses have heard the words of the contracting parties, it is proper that the marriage should be valid, although

they may not be fit to give their deposition. (See Futawai Alumgiree, Vol. 3, p. 551, where it is laid down what witnesses are incompetent to give testimony, and amongst those are the blind, the dumb, &c., or if they are husband or wife, and so on).

971. (71). When a man marries a woman, the marriage being witnessed by two of his sons from a different woman, or by two of her sons from a different husband, the marriage is valid: and if he marries her, the marriage being witnessed by two of his sons by her (as when after having children he had divorced her), then according to Zahir Ruwayet, the marriage is valid, but in the Moontuka it is stated that the marriage is not valid.

972. (72). And if a man marries a woman, the marriage being witnessed by two of his sons from a different woman, then if they (the contracting parties) subsequently deny the marriage (that is, one of them denies the marriage contract and the other affirms it) and the two sons give their testimony, then if the father denies whilst the woman is the claimant (in affirmance of the marriage), the testimony of the sons is valid (that is, it is fit to be received): but if the father is the claimant (in affirmance of the marriage) and the woman denies, then the testimony of his sons is not fit to be received. And if the marriage is witnessed by her two sons from a different husband, and subsequently they deny the marriage (that is, one of them denies it and the other affirms it), then if the mother claims (the marriage), the testimony of her sons will not be received: but if she denies and the husband claims, the testimony of the two sons is valid (and will be received). (The principle is, that the testimony of the sons in favor of their own parent is not receivable in the same way as one's own testimony is not receivable in his own favor). And if the marriage is contracted by being witnessed by his two sons by her, then whichever (of the two contracting parties) denies, the testimony of the two sons will not be received (in proof of the marriage so affirmed and disputed).

973. (73). If a man has given in marriage his daughter, the marriage being witnessed by two of his sons, the marriage is valid: and if they deny the marriage after this (*i. e.*, if the father of the daughter, or the man to whom she has been given in marriage disputes the marriage), and the sons give their testimony, the denial being on the part of the husband and the claim (in affirmance) being on the part of the father, then if the daughter (*i. e.*, the girl who has been married) is a minor, their evidence (in support of the marriage) shall not be accepted: but if she is of age, then if the claim is by the

husband and the denial is by the father, the testimony of the sons shall be accepted (in support of the marriage) according to the concurrence of all the Imams; but if the claim is by the father (in affirmance of the marriage) and the denial is by the husband, their testimony (in support of marriage) shall not be accepted according to the view of Aboo Haneefa and of Aboo Yusoof, on whom be peace! but Mahomed, on whom be peace! has held that it shall be accepted.

And if he (the father) has given in marriage his daughter, who has attained majority, the marriage having been witnessed by two of his sons, then if the woman denies her consent, and the father is the claimant (saying "My daughter consented to the marriage,") the testimony of the two sons shall not be received in support of the consent.

974. (74). The result (of paragraphs 72 and 73) is, that their testimony (*i. e.*, the testimony of the sons referred to in paragraphs 72 and 73) for their sisters and against their sisters is receivable: and their testimony against their father is receivable when the denial is by the father: and (generally) if they give testimony in favour of their father, when the father is the claimant, then if in the matter of the claim the father is in some way interested (or benefited), for instance, when they (the sons) give testimony in support of a contract on which some rights of the father depend, their testimony shall not be accepted: but if the father is in no way interested in the contract except that he is the claimant, then the testimony of the sons shall not be accepted according to the view of Aboo Yusoof, on whom be peace, and it is said (by some) that this is the view of Aboo Haneefa (and not of Aboo Yusoof).

And the illustration of the case (*viz.*, where the father claims and still has no interest) is when a man says to his slave, "If such and such person shall talk to thee, then thou art free;" then the two sons of that such and-such person give testimony that their father did converse with the slave: then if their father denies, their testimony is permissible (receivable): but if their father is the claimant, their testimony shall not be accepted according to Aboo Yusoof, on whom be peace! because he, Aboo Yusoof, has regard to the claim (*i. e.*, to the fact that the father being the claimant, the sons are not competent witnesses), whilst according to Mahomed, on whom be peace! their testimony shall be received, because he, Mahomed, has regard for the interest of the father, in excluding the testimony of the sons.

975. (75). And the testimony of a person in what he himself has

been concerned (*bashara, i. e.,* or taken part) is void by agreement (*i. e.,* by the concurrence of the learned without any difference) whether he has done it for himself or for somebody else; and whether that somebody else is a claimant or not in this matter: therefore the testimony of the *Vakeel* (or agent) in the marriage is not valid, (that is, not admissible, because the evidence of the party himself is not admissible and the *Vakeel* or agent is merely his representative).

976. (76). And if the *Vakeel* (or agent) for marriage gives his (female) client in marriage in the presence of her father and of another witness, the marriage is valid; and so also if the woman (herself) gives herself in marriage, the witnesses being her father and another witness. And similarly, if a man appoints another man as his *Vakeel* for giving in marriage his minor daughter, and the *Vakeel* gives her in marriage in the presence of her father and of another witness, the marriage is valid.

977. (77). And if a woman lays claim to a marriage against a man who denies the marriage: the woman examines two witnesses who differ as to the amount of dower, so that one of the witnesses deposes that the husband married her for one thousand, and the other witness deposes that the husband married her for one thousand and five hundred, and the woman claims the marriage for one thousand and five hundred, then the testimony of those witnesses is valid (and the marriage shall be proved); but the Kazy shall adjudge one thousand (because both witnesses agree as to the thousand, and there remains only one witness to prove the excess of five hundred): but if the husband is the claimant (for the marriage with a dower of one thousand) and the woman denies the marriage, and two witnesses depose in the manner aforesaid (that is, one says, the dower was one thousand, and the other says, it was one thousand and five hundred), their testimony shall not be accepted, and the Kazy shall not adjudge the marriage. (The principle is, that the testimony of witnesses must not be disproved by the claim: if the claim is for a thousand and five hundred, and one of the two witnesses deposes to a thousand, and the other to a thousand and five hundred, both witnesses support the claim for a thousand, and no witness is contradicted by the claim, and there will be a decree for a thousand; but if the claim is for one thousand and the witnesses depose, one, to a thousand, and the other to a thousand and five hundred, the latter witness is contradicted by the claim, and his testimony is not acceptable; because the claimant would not have claimed one thousand if the debt had been one thousand and five

hundred: there thus remains only one witness to prove a thousand, and the claim will, therefore, not be established: the testimony should be in accord with the claim, and there are two ways of accord: one is when the amount deposed to is equal to the amount claimed, and the other is when the amount deposed to is less than the amount claimed. See Fatawai Alumgiree, Volume III., p. 586, lines 1 and 2. In the instances cited in the text, the principle here cited regulates the case, and the fact that the wife or the husband is the claimant is a mere accident).

978. (78). And if the witnesses differ (amongst themselves) as to place or time, their testimony shall not be accepted.

979. (79). And if the woman lays claim to marriage against a man who denies the marriage, and produces two witnesses, the *Kazy* shall adjudge the marriage; and the denial by the husband of the marriage shall not amount to a divorce.

980. (80). And if the husband and wife disagree, one of them saying that the marriage was in the presence of witnesses, and the other saying that it was not in the presence of witnesses, then the allegation to be accepted is that of the party who says that the marriage was in the presence of witnesses (that is, in the absence of witnesses when the *Kazy* proceeds to determine which party is to be put on oath, or *Yameen*): and in the same way if the parties disagree as to validity or invalidity (of the marriage) on a ground *different from that here stated (that is, the allegation of the* party who claims validity shall be accepted).

981. (81). And if a woman claims that her father gave her in marriage when she had already attained puberty without her consent, and the husband claims that her father gave her in marriage when she was a minor, the word to be accepted is the word of the woman (that is, in the absence of witnesses when the case is to be decided by oath of the party): but if the woman (goes into evidence and) establishes proof or *byyuna* to the effect that she was a daughter (girl) of the age of 20 years at the time of the marriage, and the husband goes into evidence that she was a daughter of the age of 8 years, the evidence to be accepted is that adduced by the woman: (the oath of the denying party is accepted as a rule; and when proof is adduced the proof adduced by the party who alleges contrary to what is obvious is to be accepted: the rule is, that *byyuna* is on the claimant and the oath is on the party denying).

982. (82.) If a man gives in marriage his daughter, and the marriage

is witnessed by drunkards (who are intoxicated at the time) who hear the words of the contracting parties and realise the meaning, the marriage is valid, although they might, after the intoxication has subsided, forget what had taken place.

983. (83.) A man marries a woman citing as witnesses God and his prophet, the marriage is void, (on the authority of the prophet himself, on whom be the blessings of God), the prophet having laid down, that "There is no marriage except when there are witnesses," whilst every marriage that takes place is witnessed by God: and some of the learned have held that such a marriage involves *Koofr* (blasphemy or infidelism), because it involves belief that the prophet knows hidden things, which is blasphemy.

984. (84.) A man says in the presence of witnesses, "I have married this woman, her who is in this house," and the woman says, "I have accepted," and the witnesses hear her words but do not see her self in person; then, if there is in the house no woman except one woman, the marriage is valid, otherwise not. And so also if a woman appoints a Vakeel (or agent), and the witnesses hear her words (of appointment), but do not see her self in person, this stands on the same footing (*i.e.*, the appointment is valid if there is only one woman in the house).

985. (85.) And if the husband and wife differ (without there having been sexual intercourse between them), the man saying, "I married thee when I was a minor without the permission of my guardian," whilst the woman says, "Thou didst marry me after attaining majority," his word shall be accepted (on oath, that is, when parties do not go into evidence), and the Kazy shall say to him, "Dost thou validate (or ratify) this marriage?" then if he validates the marriage (or ratifies it) the same is valid; but if he repudiates it, it is void: and if he has had sexual intercourse with her after majority, this will amount to a ratification. (See Futawai Alumgiree, Vol. IV, p. 308, line 16).

986. (86.) When the Vakeel (or agent) for marriage claims that he had the contract witnessed by witnesses, but the client denies that (that is, that there were witnesses to the marriage); the word to be accepted shall be that of the Vakeel for marriage, and unlawfulness will be established by the admission of the client that the marriage contracted by the Vakeel was without witnesses.

987. (87.) When a man deposes against his wife that she was the slave girl of so and so who is the claimant; then if he has already paid her

dower, his evidence shall be allowed, otherwise not (because in the case of a slave girl the dower becomes the property of the master).

988. (88.) Another condition in marriage is, that there shall be a guardian: and the existence of a guardian is a condition for the validity of the marriage of minors, and lunatics, and slaves.

989. (89.) The learned have differed (in regard to the validity of marriage), in the case of a woman who is *akila* (or possessed of understanding) and has attained puberty when she gives herself in marriage, (the difference being whether a marriage by such a woman without a guardian is valid or otherwise). Aboo Solaiman reports from Mahomed, on whom be peace, that her marriage is void (or *batil*) and Aboo Hufs reports from him (Mahomed) on whom be peace, that if she has no guardian, the marriage is valid: but if she has a guardian, the validity of the marriage shall depend on the permission (or ratification) of the guardian, so that if he permits (or ratifies) it is valid, and if he repudiates it, it is void, whether the husband is of the same *Koofoo* (or rank) or not; but if he is of the same *Koofoo* (and the guardian has repudiated the marriage), it is proper for the Kazy to renew the marriage, and the woman shall not be lawful to her husband without such renewal of marriage. And Malik and Shafei, on whom be peace, have said that marriage cannot be contracted by the words of a woman who has given herself in marriage, or has given her slave girl in marriage, or who is the Vakeel of another woman.

And in the Zahir-i-Ruwayet it is reported from Aboo Haneefa, on whom be peace, that the marriage is valid whether the woman is a *Bakira* (a virgin who has not been married whether she has seen a man or not) or a *Syeeba* (who has been married whether she has had sexual intercourse or not) when she gives herself in marriage to one of her own *Koofoo* or one not of her own *Koofoo*; except that if the man is not of her *Koofoo*, the guardian is entitled to object.

And Hussan has reported from Aboo Haneefa that the marriage is valid if the husband is of the same *Koofoo*; but if he is not of the same *Koofoo*, it is not valid at all.

And the reports (that is, the traditions) from Aboo Yusoof are disagreed (that is, some report that the marriage is valid, others that it is not so).

And in our present times what is fit for (to be adopted as) *Futwa*, is the report of Hussan, on whom be peace.

Sheikh-ool Imam Shumshool Aima Surakhsy, on whom be peace, says the report of Hussan is the nearest precaution; for all the guardians are not actuated by a *bonâ-fide* spirit in having a case before the Kazy;

nor are all the Kazees just. Therefore it is a proper safeguard that marriage be barred to a woman where there is a difference of *Koofoo*.

And Aboo Yusoof, on whom be peace, says that proper precaution is attained by prescribing that the marriage shall be dependent on the permission (or ratification) of the guardian; except that in case the husband is not of the same *Koofoo*, the guardian is justified in setting aside the marriage; but if he is of the same *Koofoo*, he is not justified in so doing. Therefore (according to Aboo Yusoof), if the husband divorces her before there has been a case before the Kazy, and he is of the same *Koofoo*, his divorce is valid against her, and so also as to Ella and Zihar: and if one of them dies, the other will inherit (because the marriage is valid the *Koofoo* being the same). And, according to the view of Mohamed (that is, as reported by Aboo Hufs) if the husband divorces his wife before there has been a case before the Kazy, this amounts to separation, so that if the guardian afterwards (that is after such a *Taluk*) gives his permission to the marriage, his permission is not valid (because the husband has already frustrated the marriage), but the woman shall not become unlawful (to the man) by such a *Taluk* (or divorce, there having been no valid marriage); and if the man has pronounced three *Taluks* (divorces) it is (merely) abominable (and not forbidden) to him to marry her before her marrying a different person.

990. (90). And all have concurred in this that if the woman (who is *akila* and *baligha* as aforesaid) makes an admission of marriage, such admission is valid (that is to say, the Kazy shall accept her admission, and in the matter of making admissions it is not necessary that she should have a guardian).

991. (91). And one of the conditions of marriage is the consent of the woman, when she has attained puberty, whether she be a virgin (unmarried, whether she has had sexual intercourse or not) or married (Syeeba, *i. e.*, a woman who is married whether she has had sexual intercourse or not). Thus the guardian has no authority according to us (the Hanifites) of compelling her to marry (that is, of giving her in marriage without her permission or consent).

992. (92). Therefore if her father (that is, in the same case where the woman is possessed of understanding and has attained puberty) asks permission of her before marriage, saying, "I am giving thee in marriage" without mentioning (the amount of) the dower, and (the name of) the

husband, and the woman keeps quiet; then silence on her part shall not be (construed into) consent, and she is entitled to repudiate (the marriage) afterwards. And so also, if he says, "I am giving thee in marriage to (one of) the neighbours, or to (one of) the sons of my uncle," and they (the neighbours or the uncle's sons) are so numerous that they cannot be counted (so that she cannot say who is intended): because consent to some thing indeterminate (or uncertain) cannot be established. (See also Futawai Alumgiree, Vol. I, p. 406, line 7, where it is laid down that if they could but be counted, the marriage will be valid because she can roughly pass them through her mind and estimate their fitness and qualifications, but if they are so numerous that they cannot be counted, then this process is not possible).

993. (93). And if in asking for the permission (referred to in the above paragraph) he (the father) mentions the (name of the) husband and the (amount of the) dower, and the woman keeps quiet, then silence on her part is consent: but if he mentions the (name of the) husband and does not mention the (amount of the) dower and the woman keeps quiet, it is laid down that if he makes a gift of her to the man (that is, if in giving her away in marriage he makes use of words of gift and does not name a dower, or makes use of the word marriage, without naming a dower, or negativing the dower) then his giving the woman in marriage will be operative; because she has consented to a marriage in which dower was not mentioned, and it is clear that this marriage (so contracted as aforesaid) is for the proper dower, and marriage by the use of the word gift (that is without naming a dower or negativing dower) renders the proper dower obligatory: but if he gives her in marriage by naming a dower, then the marriage contracted by him will not be given effect to because she has not consented to the dower fixed by the guardian; therefore the marriage contracted by the guardian will not be operative except by a future permission.

994. (94). And if the guardian (that is the father) has given her (*i. e.*, a woman of full age and understanding) in marriage without asking her permission, and he then after the marriage gives her information, and the woman keeps quiet, then if the guardian has informed her of the marriage without mentioning the (name of the) husband and the (amount of the) dower, there is a difference (amongst the learned) in this case: and the correct doctrine is that this silence will not be consent as in the case in

which before marriage he asks her permission without mentioning the (name of the) husband and without mentioning the (amount of the) dower: but if he mentions the (name of the) husband and the (amount of the) dower and the woman keeps quiet, this is consent, and if he mentions the (name of the) husband and does not mention the (amount of the) dower, then in this case the rule is the same as has been mentioned above in the case in which permission was asked of her before marriage; (that is, if the father has given her in marriage without naming a dower, then the marriage is valid, but if he has fixed and named a dower, then the marriage will not be operative unless the woman ratifies it in future for the dower fixed and named); and if he mentions the (amount of the) dower and does not mention the (name of the) husband, and the woman keeps quiet, her silence is not consent, whether he asks her permission before marriage or gives her information after marriage; because the husband is the principal subject (of which she must get information), and her ignorance of the husband forbids her consent.

995. (95). And if the guardian names the man (to whom the woman is to be married) in asking for the woman's permission before marriage, and the woman says, "Other than he is more pleasing to me," this is not permission by her: but if the same thing happens after marriage (that is, if after the guardian has given the woman in marriage without her permission, he conveys the information to her naming the husband), then her expressing herself in these words, "Other than he is more pleasing to me" is not repudiation of the marriage, because these words are ambiguous (that is, they contain two meanings; one is, I do not like him at all, but like another; and the other is, I like him but I like another better), and the marriage which has been contracted cannot thereby (that is, by the use of such an ambiguous expression) be rendered null; whereas before marriage, a doubt is caused (or created) in the marriage to be contracted by the guardian (the doubt is, if the first is her meaning, she absolutely refuses permission, but if the second is her meaning, then she does give consent) and the marriage cannot be validly contracted by reason of the doubt.

996. (96). A virgin (that is, an unmarried woman, whether she has had sexual intercourse or not) is given in marriage by her guardian (without her permission, she being of age and understanding); then intelligence is received by her (of the marriage) and she laughs (or smiles); this is consent, because laughing is a mark of pleasure: and if she cries, there is a

difference (among the learned); and the correct rule is this: if her cry is accompanied with tears and unaccompanied with sound (or noise), this is consent; but if the cry (which is accompanied with tears) is accompanied with sound and noise, this is not consent: and if at the time she receives intelligence she is seized with a cough or sneezing, then, if after the cough and sneezing have subsided she says, "I do not consent," her repudiation is valid: and in the same way, if her mouth has been stopped (so that she might be precluded from instantly repudiating the marriage) and then released, and then she says, "I do not consent," her repudiation is valid, because her silence (when her mouth was shut by force) was caused by force (or compulsion).

997. (97). And if the guardian says to her before marriage, "Verily so and so has proposed to (for) thee," and she says, "Do not give me in marriage to so and so, because I do not approve of him," and the guardian gives her in marriage (to that so and so) and then she receives intelligence and keeps quiet, the marriage is valid; because repudiation before marriage does not imply repudiation after marriage, by reason of alteration of state (of mind): but if she says after marriage "Verily did I say, verily I do not approve of so and so" (that is to say, I have already told you I do not like him) and does not add anything to this, the marriage is not valid, because she conveys information after marriage that she is in the former state (of mind) and her state of mind has not changed.

998. (98). A woman of age has been given in marriage by her guardian: then intelligence reaches her, and she says, "I do not intend (like) a husband;" or she says, "I do not intend (to have) so and so (as my husband)," this is repudiation. And some of the learned have said, if she says, "I do not intend (like) a husband," this is not repudiation: but the first is correct, because her statement, "I do not intend (like) a husband" is repudiation of (the idea of having) any husband at all: this therefore amounts to repudiation of so and so and of all others.

999. (99). And if the guardian gives her (a woman of age) in marriage, which she repudiates, and the guardian then in a different meeting says to her, "Verily various families or tribes (that is, many persons) are proposing to (for) thee," and she says, "I consent to what you will do," and then the guardian gives her in marriage to the person to whom he had first given her in marriage (and who had been repudiated by her), but the woman (again) refuses to ratify such marriage, it is valid for her to do so

(that is, to withhold her ratification, and in so withholding it she acts within her right): because her statement that "I consent (to what you will do)" refers to other than the person to whom she had been first given in marriage, for what they (the guardian and the woman) say amounts to this :—He (the guardian) says to her, "When thou deniest so and so, then a different tribe (that is other persons) are proposing for thee," and she then says, "I consent to what thou shalt do, excepting the first person (*i.e.*, the person to whom she was first given in marriage)."

And this is the same as where a man divorces his wife; and he says, to another man, "I did not like the company of so and so, and I, therefore, divorced her; give in marriage to me a woman whom thou pleaseth :" then the man gives the same woman who had been divorced in marriage to him: this marriage is not valid, and the husband's request must have reference to a different woman.

And so also if a man sells his slave, and then asks another person to purchase a slave for him: and that person purchases the same slave: this is not valid.

The same rule, therefore, applies to the case under consideration.

1000. (100). When the guardian has given a virgin (an unmarried woman, who has had sexual intercourse or not) who has attained puberty, in marriage, and the husband and wife differ, the husband saying "Thou didst receive intelligence of the marriage and keep quiet," and the woman saying "No, on the other hand, I repudiated (the marriage)," the word to be accepted is that of the woman, according to us (the Hanifites; that is when neither party proposes to go into evidence, and the Kazy has to decide on oath, then the woman's word on oath is to be accepted): as in the case of a person who takes a loan (of a thing which must be returned) when he claims to have returned the thing which had been so in trust with him, and the person who gave the loan denies (the fact), the word to be accepted is that of the borrower, because he denies liability to damage on himself. The same rule holds good in the present case (*i. e.*, the case of dispute between husband and wife of the nature under consideration), because the husband claims that the contract is obligatory and the woman denies (the obligation of the contract), therefore the word to be accepted is that of the woman. And if both parties go into oral evidence (the husband to prove that she kept quiet, and the wife to prove she repudiated), the evidence to be accepted is the evidence of the woman to establish repudiation; because her proof is as regards that which is affirmative in appearance

(and form; that is, her repudiation), and the proof of the husband is regarding a negative: but if the husband goes into oral evidence that she permitted (or ratified) the contract, and the woman goes into oral evidence of repudiation, the evidence to be accepted is that of the husband; because both allegations (that is, the allegation of ratification and that of repudiation) are equal in point of being affirmative in appearance (and form) and the oral evidence of the husband is preferred; because it (involves an affirmative and) goes to establish that the contract is obligatory (and proof of repudiation involves a negative, that is, that the contract is not obligatory). And no oath is to be given to the woman according to Aboo Haneefa.

And if the husband has had sexual intercourse with her with her submissive willingness, she shall not be believed in her claim of repudiation, but if he has had sexual intercourse against her will, then she shall be believed in her claim of repudiation.

1001. (101). Silence is held to be consent in certain cases of a limited number. One case is when a virgin (who is of age) has been given in marriage by her guardian: then she comes to know of it, and keeps quiet; her silence is consent.

Another case is, where two men agree amongst themselves privately (saying) that "We shall make it appear as if we are selling one to another, but in reality the sale shall, as between us, be only a *Tuljeea* (or unreal sale)." Afterwards (that is, after they have so agreed, but before sale) one of them says to the other, "We did so agree privately, but verily it appears to me proper that I should render the same a true sale," and the other keeps quiet: and then they sell one to the other; the sale will be a true sale.

Another case is, where the infidels make a man's slave a prisoner; and, after that the slave falls into the plundered property (that is, after a *Jehad*) and is divided, and his first master is present (at the division) and he keeps quiet and does not ask for the slave, his right to have his slave restored to him is void (or lost).

And another case is, where the purchaser takes possession of the thing sold before paying the price, and the seller sees it and does not prevent the purchaser from taking possession, this will be permission (by the seller, authorizing the purchaser to take possession).

And another case is, where the master sees his slave making sales and purchases, and does not prevent the slave from selling and purchasing, but keeps quiet, this will be permission (because, according to law, the slave has

no right of his own to enter into trade, and sales and purchases by him, without permission, are void; but with permission they are valid although they are for the benefit of the master.

And another case is, where a man purchases a slave on condition that he shall have the option of three days, and then the purchaser sees the slave selling and buying (that is, sees that the slave sells and buys) and keeps quiet, the sale of the slave becomes binding, and the option is void (lost): but if the option was with the seller, his option will not be void.

And another case is, where a pre-emptor knows of the sale and keeps quiet, his right of pre-emption becomes void (or lost).

Another case is, where a slave is sold (by one having authority to sell) he (the slave) being present, but the slave keeps quiet, or, as in some authority, submits to the sale and delivery, and afterwards he (the slave) says "I am a free man," his word shall not be accepted.

And another case is, where a man takes an oath on God, and says, "I will not allow so and so to stop in my house:" and that so and so (afterwards) does come to the house (of the man who had so sworn), and the person who had sworn keeps quiet, his oath is broken (because his silence amounts to consent): but if he says (to the comer) "Get away from my house," and the comer refuses to go away, and the oath-taker keeps quiet after this, his oath shall not be broken.

And another case is, where a woman gives birth to a child (may be that the husband has been away for several years), and people offer congratulations to the husband on account of the child and he keeps quiet: the (descent or paternity of the) child is obligatory on him, so that he has no power to deny the same afterwards.

And another case is, where the donee takes possession of the thing given at the same meeting at which the gift is made, and the donor keeps quiet, this is permission to take possession, and the gift is complete by way of analogy. (The principle in the case of gift is, that gift should be followed by possession or seisin, and this should be with permission: if possession is taken at the same meeting without objection, this is constructive permission, but after the meeting, the permission should be express). And so also in case of a *fasid* (invalid) sale, according to the tradition whereby taking possession with the permission of the vendor is looked upon as creating property, if the purchaser takes possession in the presence of the vendor, and the latter keeps quiet, the purchaser's possession is valid, and it will create property in him (that is to say, there are two traditions in a case of

invalid sale; one is, that possession even in case of express permission does not create property in the thing sold, and the other is that possession with permission does create property: according to the latter tradition permission might be implied by silence).

Another case is that of the Oomm-i-Wulud, or slave girl, who is mother of a child (by the master): she gives birth to a child: then the master keeps quiet for a day or two: the parentage shall be established (in him) and it will not be valid for him to deny the parentage afterwards: (that is the case supposes that the slave girl has not been married to anybody, is under the protection of her master and gives birth to a child; then in order to establish parentage in him, he must claim the parentage of the child; and this claim is called *Daiwut*, and the slave girl is then styled Oomm-i-Wulud: but in the case of a child by a wife, parentage is established without *Daiwut* or claim by the existence of marriage: then in the case of an Oomm-i-Wulud, if she gives birth to a second child, the parentage will be assigned to the master, unless he repudiates the same: therefore his silence implies his admission of the parentage and descent being in him).

1002. (102). And if a woman gives herself in marriage to one who is not of the same *Koofoo*, then intelligence reaches the guardian, and he keeps quiet; this is not consent. But if he takes possession of the dower or sends her with him (to his house) this is consent: and if he raises a dispute with the husband regarding the dower or maintenance, then according to *kyas* or analogy, this will not be consent, but according to *istihsan* or weak analogy this will be consent. (Such a case will arise only when the rule applicable is that laid down by Aboo Huneefa according to Zahirool Rawait: it is only then that the guardian's consent is relevant. See *ante* paragraph 89: see the same principle in Futawai Alumgiree, Vol. I, p. 412, line 13, &c.).

1003. (103). A man gives in marriage his daughter, who is a virgin and has attained her puberty, to one who is not of the same *Koofoo*: then she comes to know of it and keeps quiet. Some of the learned have said her silence is not consent, and others have said that according to what is laid down by Aboo Huneefa, this is consent, because according to Aboo Huneefa, the father is the guardian having authority to give her in marriage to one who is not of the same *Koofoo*; and if she is a minor, the contract is obligatory, and if she is of age the contract is dependent on her consent, in the same way as if he (the father) had given her in marriage to one of the same

Koofoo. And the grandfather in the absence of the father has in this matter, the same authority as the father: but except the father and the grandfather no other guardian has authority to give her in marriage to one who is not of the same *Koofoo*, and therefore, her silence is not consent (*i.e.*, when beside the father and the grandfather, some other guardian has given a woman of age in marriage to one who is not of the same *Koofoo*): in the same way as if a stranger had given her in marriage to one of the same *Koofoo*, and she keeps quiet: this silence on her part is not consent, but she must speak.

1004. (104). A man says to a woman who is a stranger to him, "Verily do I intend to give thee in marriage to so and so;" she then says in Persian, "Thou knowest best:" Aboo Leith, the lawyer, on whom be peace, says, this is not consent. And some of the learned have said that her expression "Thou knowest best," and her expression "Thou knowest," are expressions of consent according to the custom of our country.

And if she says, "This is upon you," (that is, this depends on you, or you are at liberty); this will amount to appointment as Vakeel or Agent according to the views of all (the Imams, that is, Aboo Haneefa, Aboo Yusoof, and Mohamed).

1005. (105). And Natify has reported from Aboo Yusoof, on whom be peace, as follows:—A slave asks permission of his master in order that he might get married: then the master says, "Thou knowest," this will not be consent; but if he says, "This is upon you," (that is, this depends on you, or you are at liberty), this is permission and delegation of authority (to marry).

1006. (106). A man marries a woman (that is, contracts a marriage with a woman and marries her to himself) without her permission. Then intelligence reaches her and she says (in Persian) "There is no fear;" some of the learned have said this is permission, but it is better that this should not be construed into a consent.

1007. (107). A man gives in marriage his daughter who has attained her puberty: then when intelligence reaches her, she says not a word; then on being questioned the second day, she says, "I do not consent to what my father has done: (would that) I married another." Abool Kassim Suffar, on whom be peace, says, if she did not know the (name of the) husband and the (amount of the) dower (the first day), but came to know of it (the second day) and repudiated the marriage, the marriage contracted by the father shall be void.

1008. (108). A virgin was given in marriage by her guardian: then she says after a year, "When I received intelligence of the marriage, I said I do not consent," the word to be accepted shall be hers, but if she says, "I received intelligence of the marriage more than a year ago and I repudiated it," her word shall not be accepted. (When a guardian gives in marriage a woman, who has attained puberty, then, in order that her repudiation should be given effect to, that repudiation must be immediately after she receives intelligence of the marriage. In the first case she says, "As soon as I received intelligence of the marriage, I repudiated it," therefore her word is to be accepted: but in the second case she does not say that the repudiation followed immediately on the intelligence, but she only says, "I received intelligence more than a year and I repudiated it;" this does not mean that the repudiation was immediate). And if she receives intelligence at a time when people are about her, and she says, "Verily did I repudiate the marriage *when* I received the intelligence, but they did not hear this from me," her word shall not be accepted; because when the people did not hear the repudiation, her silence was established to them, and her consent was proved.

1009. (109). A minor girl has been given in marriage by a guardian other than a father or grandfather: she (instead of repudiating the marriage as soon as she attains her puberty), says *after* she attains puberty, "Verily did I repudiate the marriage (literally take up my own self) as soon as I attained puberty," her word shall not be accepted: contrary to the first case (see paragraph 108) because the option of puberty is to annul a contract which is operative (contrary to the case where the guardian gives a grown up girl in marriage, in which case the contract is not operative, but is dependent on her permission): and therefore, she becomes a claimant to avoid a right which has already been established (and that could only be avoided by proof that she actually cancelled the marriage as soon as she attained puberty, and not by a statement of hers made after she attained puberty to the effect that she cancelled it on attaining puberty, which does not necessarily shew that she did so as soon as she attained puberty).

1010. (110). A man gives in marriage his adult daughter, and it is not known until the death of her husband whether she had consented or repudiated the marriage, (that is, during his lifetime nothing was known and the spouses had not come together), then the heirs of the husband say, "She was given in marriage without her permission, and she never knew of the marriage and never consented to it, and therefore, she is not

entitled to inherit:" Whereas she says, "My father gave me in marriage by my permission:" her word shall be accepted, and she will be entitled to inheritance, and *iddut* is binding on her. And if she says "My father gave me in marriage without my permission, but I received intelligence of the marriage afterwards, and then I consented to the marriage:" she is not entitled to dower, and will not have the right of inheritance; because she admits that the contract which took place was (in the beginning) inoperative; therefore when she claims that the marrriage was afterwards rendered operative, her word shall not be accepted on account of this being a place (or matter) where false claim might be set up.

1011. (111). A virgin has been given by her paternal uncle's son in marriage to himself (without her permission), she having attained her puberty at the time of marriage; afterwards she receives intelligence (of the marriage), and keeps quiet, and then says I do not consent. She is entitled to say so; because the paternal uncle's son has acted as principal on his own behalf, and as Fuzoolee (or stranger and volunteer, and as an unauthorised person) on behalf of the woman, and therefore the contract is not complete according to Aboo Haneefa and Mahomed, on whom be peace, and therefore her consent is not operative. (Here the paternal uncle's son is principal as on his own behalf, and he is Fuzoolee as regards the woman: and the marriage, according to Aboo Haneefa and Mahomed, is not valid at all, and is not at all dependent on the consent of the woman: therefore the woman's silence or her express permission will not be sufficient to validate it. If there had been another Fuzoolee on her behalf, then the marriage would be dependent on her permission. The word of one person is sufficient to validate marriage when he is the guardian or vakeel of both; or guardian of one and vakeel of the other; or principal as on behalf of one and vakeel or guardian of the other: see paragraph 50).

1012. (112). A man gives in marriage another man to a woman without his (the former's) permission (that is, the woman personally expresses her acceptance, and on behalf of the husband a man acts without his authority as a Fuzoolee) then he receives intelligence (of the marriage) and says, "It is good what thou hast done;" or "God may bring good fortune to us in the woman;" or he says, "Thou hast done well;" or "Thou hast acted properly:" this is permission; but if it appears that he intends a joke by these expressions, and that he has used them by way of a joke,

then in this case this will not be permission. So it has been laid down by Sheikhool Imam, known as Khahir Zada (sister's son) in his commentaries on Akrah, as a report from Aboo Nusur, son of Salam, who reports from Mahomed, son of Sulma, on whom be peace. And if he says, "There is no fear," this is not permission. And it is reported by Hisham from Mahomed, on whom be peace, that the expression "It is good what thou hast done," or "Thou hast done well," or "Thou hast acted properly," is consent: and that the expression "It is bad what thou hast done," is not consent. And if he had said "It is not well what thou hast done, (but it is done)" it is said (by some) that this is permission: (meaning that others do not regard it as permission) and if people congratulate him and he accepts their congratulations, this is permission.

1013. (113). A minor boy marries a woman of full age and disappears: then when he appears again (that is after his reappearance) the woman marries a different husband: but the minor boy (the first husband) had after attaining majority ratified the marriage which he had contracted during minority: then if the woman married the other husband before the ratification of the minor boy, the second marriage is valid; because she is entitled to annul the (first) marriage before ratification by the minor (after attaining majority). But if the second marriage has been contracted after ratification by the minor (after attaining majority), then it must be seen whether the marriage, which had taken place during minority (of the husband) was for Meher-i-Misl (or proper dower), or for such dower (in excess of the Meher-i-Misl) that people put up with and do not feel the excess (*i.e.*, if the amount of dower in excess of Meher-i-Misl) is not very large, and is so small that practically the dower is only Meher-i-Misl, in which case the second marriage is not valid, because the marriage was (not void but is regarded in law as) dependent (on the husband's ratification): the marriage, therefore, is operative by the ratification of the minor after attaining majority; but if the dower is very large, so that people cannot put up with it, then if the minor has a father or grandfather, (who does not say one word in the matter either by way of approval or disapproval), the rule is the same (that is, the second marriage is not valid), because they (the father and the grandfather) have authority against the minor boy to give the minor boy in marriage for a large dower; therefore the marriage of the minor boy (for this large dower) is dependent on their ratification: the marriage, therefore, becomes operative by the minor's ratification after age; but if the minor boy has no father or grandfather, then the second

marriage by the woman is valid, because the contract by the minor (boy) in this fashion (where he renders himself liable to a disproportionately large amount of dower where he has no father or grandfather), is not dependent (on anything, but is void) and therefore ratification is irrelevant with reference to it. (When the minor boy has a father or grandfather, and he makes himself liable to a large amount of dower, the marriage is not void but dependent on the ratification of the father or grandfather, who are the best judges of the welfare of the minor boy, and can veto the same: but when the dower is very large, and he has no father or grandfather, then the marriage is void because the minor cannot act to his detriment).

1014. (114). A man gives in marriage his minor daughter to another man's son, who is of age; and the father of the boy accepts the marriage without the permission of his son: then the father of the minor daughter dies (whilst she is still a minor) before the major son has ratified the marriage: the marriage is void: because the father of the minor daughter was entitled to annul this marriage which was dependent (on the ratification of the husband), and the death of the father of the minor daughter before the marriage has became operative amounts to nullification of the marriage (the principle being that a marriage which is dependent on something can be repudiated or nullified by either of the parties: here the right of repudiation is in the father and not in his minor daughter). Similar to the case of a woman who gives herself in marriage to an absent man, and the marriage is accepted on behalf of the absent (husband) by a Fuzoolee (an unauthorised person), in which case the woman is authorised to nullify this marriage, and her death, before the marriage has become operative (by the ratification of the absent husband) is nullification of the marriage. The same rule holds in the case under consideration (that is, when the father of the minor daughter dies before the adult boy has ratified the marriage).

But if a man gives his adult daughter in marriage to an absent man, and the marriage is accepted on behalf of the husband by a Fuzoolee, and then the father of the woman dies before ratification of the marriage by the absent (husband), then the marriage effected by the father is not avoided in consequence of his death, because if the father intended to avoid the marriage, he had no authority to do so according to Aboo Yusoof and Mahomed, on whom be peace, for he is a Fuzoolee: therefore the marriage is not annulled by his death. (Here there are Fuzoolees on both sides;

therefore the marriage depends on the ratification of both the parties themselves, and neither Fuzoolee has a right to avoid or ratify: the right to avoid is in the person who can ratify, and that is the husband or the wife).

1015. (115). A man gives his adult son in marriage to a woman without his permission: the son becomes insane before he has permitted (or ratified) the marriage: the lawyers have laid down that it is fit for the father to say "I have ratified the marriage for my son;" because the father is authorised to contract Nikah (make Insha) initially for his son after the latter's insanity (*i.e.*, he, as the guardian of his insane son, is authorised to create the marriage relation for his son), and, therefore, he is authorised to ratify (the previous) marriage.

1016. (116). A slave, without the permission of his master, marries one woman, then another woman, and then another (a third) woman (by different contracts): then the master receives intelligence, and he permits every one (of the marriages). (Be it noted that a free man can contract four marriages, but a slave can contract only two marriages, and that only by the permission of his master). Then, if the slave has not had sexual intercourse with them, the marriage with the third is valid; because his contracting the third marriage is a nullification of the first and the second marriages: the third marriage, therefore, is one which is dependent (on the permission of the master), and the third marriage will be operative by the permission of the master. (If the first two marriages had become operative by the consent of the master, then it is the third which would have been void: that is, if each of the three marriages had been contracted by the slave with permission previously obtained or with subsequent ratification, then the first two would have been valid and the third void: because each of the first two marriages would in that case be operative, and neither of them would be dependent: so if he marries two women, and then gets permission, they are both valid; and if after this he marries a third with previous permission or permission subsequently obtained, then the third would be void. But if he marries three women without previous permission, but permission is subsequently given with reference to each of the three marriages, then the question is, how is validity to be regulated. Each of the three marriages is inoperative without permission, and is dependent on the master's permission: and when permission is given then, according to a rule well known in jurisprudence and called the rule of *Mooghyyur*, the operation of permission is made to depend until the master has expressed himself finally, so that his permission does not operate even on the first marriage until

it is known what follows, that is, until it is known how he concludes his speech of permission: and until it is found out that he does not transgress the power of ratifying more than two in what he has to say in future, no effect shall be given to any portion of his speech: thus when he has ratified the second, the ratification is still in suspense, and if the master says nothing more, then his ratification will be operative on two marriages only: but if he has ratified the third marriage, then the ratification of the first, which was in suspense, falls through: the ratification operates on the third because there is nothing further to keep it in suspense: but the second ratification also shares the fate of the first, because as between the first and the second there is no reason for giving preference to either. See the same case in Futawai Alamgiree, Vol. I, p. 423, last two lines).

But if he has had sexual intercourse with them, his marriage is not valid with any of them: because the third marriage contract is found before the expiry of the *iddut* of the first and second, and is therefore, not valid. The third marriage is not, therefore, (only) a nullification of those that preceded it (as in the case before-mentioned, but the third is itself void): therefore, the permission of the master is not valid as (it is not valid) in case he marries all three by one contract: (Here the third marriage is void, because it is found during the *iddut* of the first and second marriages; and if the master had ratified the first two marriages only, then those marriages would have been validated: but inasmuch as he had mixed up all three together, one of which is void, the ratification is not operative on any one of the marriages).

1017. (117). And so also if a free man marries ten women without their permission (the marriages being therefore dependent on their consent) by different contracts: (if all ten have been married by one contract, the marriage of all the ten is void): then the women receive intelligence; and all of them give their consent: the marriage of the ninth and tenth will be valid; because when he married the fifth woman, this (*i.e.*, the marriage of the fifth woman) nullifies the four previous marriages, and when he married the ninth woman, this nullifies the four marriages which preceded it: therefore the marriages of the ninth and tenth are dependent on the permission of the women so married. (Here the instance involves the same principle as the preceding paragraph: because here also the marriages were not operative when first contracted, but were dependent on the consent or ratification of the wives. If the marriages were not dependent but were contracted as operative, as for instance where

the man went on marrying ten women in succession with their consent, then the first four would be valid and the others invalid. Again if by one contract he married four women, the marriage would be lawful as regards all four; but if by one contract he married more than four, then the marriage would be void as regards all the women). (But see Futawai Alamgiree, Vol. I, page 422, lines 17 and 18, where it is stated that if a man who, acting as a Fuzoolee, gives in marriage to another without his consent five women by different contracts, then the husband is at liberty to accept any four and reject the fifth.)

1018. (118). A female slave marries without the permission of her master, who afterwards (without having permitted or sanctioned the marriage) sells her: the purchaser then permits the marriage; if the husband has had intercourse (before this purchase) then the permission of the purchaser is valid, but if he has not had sexual intercourse the permission of the purchaser is not valid: because if the husband has not had sexual intercourse with the female slave, the female slave is lawful to the purchaser, by reason of ownership, and (Hill-i-bat, that is) present lawfulness (the slave girl being at present lawful to the purchaser) when it is superimposed over (Hill-i-moukoof that is) lawfulness which is dependent (the slave girl being lawful to the husband if permitted by the master), renders the second lawfulness void. But if the husband has had sexual intercourse with the female slave, it becomes obligatory on her to observe *iddut* on account of this intercourse (in the event of separation taking place); therefore her person is not lawful to the purchaser, and his permission is valid (that is, as soon as the purchaser purchased her, she became lawful to him, and her previous marriage became annulled; and therefore there was no marriage which could be ratified by permission of the purchaser).

1019. (119). And the same rule holds good in the case of a female slave who marries without the permission of her master, and the master dies without having given permission, and the heir permits (or ratifies) her marriage: if the master or the female slave's husband has had sexual intercourse with her, the heir's permission is valid, because she is (in that case) not lawful to the heir: but if the master or the husband has not had sexual intercourse with her, the heir's permission is not valid, because the heir becomes her owner by the death of her master and she is lawful to the heir; therefore the marriage being dependent (on permission) becomes void.

1020. (120). An *Oomm-i-Wulud* (a female slave who has given birth

to a child by her master) marries without the permission of her master; (the marriage being in consequence void) the master then sets her free: if the husband has not had sexual intercourse before her freedom, the marriage will not be valid by reason of the death of the master; because the *iddut* of freedom is obligatory on her, and this *iddut* prevents the marriage becoming operative: but if the husband has had intercourse before her freedom, the marriage will become valid by reason of the death of the master, because the *iddut* of the husband (*i. e., iddut* would have been necessary in consequence of the husband having had sexual intercourse in order to legalise her subsequent connection by marriage the first marriage having been *fasid*) prevents the *iddut* of freedom becoming obligatory.

1021. (121). A female *Mookatub* (a slave who is to get her freedom on earning a certain amount for her master within a fixed time) marries without the permission of her master: the master then dies (before she has earned her freedom): the heir then permits her marriage; this permission is valid, because she is not inherited (as property): her marriage therefore becomes operative by the permission of the heir.

1022. (122). The guardian of a minor boy or minor girl says, "I married the minor boy or the minor girl (as the case may be) yesterday: his allegation shall not, according to Aboo Haneefa, be accepted except on proof (the word in the original is *byyuna*, which means oral evidence) or on being confirmed by the minor after attaining majority: and so also the admission of the master of the slave regarding the marriage (of the slave) shall not be accepted except on proof (or on confirmation by the slave): and so also the Vakeel of the woman and the Vakeel of the man (shall not be heard, when the Vakeel claims to have given him or her in marriage except on proof or on confirmation by the woman herself or the man himself). And Aboo Haneefa's disciples (Mahomed and Aboo Yusoof) have held that the same (*i.e.*, the allegation of the guardian, or of the master, or of the Vakeel) shall be accepted.

And the master of the slave girl shall be accepted by the concurrence of all (three, that is, when the master alleges that he has given the slave girl in marriage, his word shall be accepted without any difference amongst Aboo Haneefa and his disciples).

And (there being no difference in the above rule) there is a differ among the learned where (or in what matter, or in what precise way difference (between Aboo Haneefa and his disciples) exists (as reg

the rule in the cases mentioned before the last case above-mentioned). It is said that the difference (between Aboo Haneefa and his disciples) exists where the minor, after attaining majority, denies the marriage, whilst the guardian admits (or alleges) the marriage: but if the guardian admits the marriage whilst the boy or girl is still a minor, the guardian's admission is valid (that is, according to some, the difference between Aboo Haneefa and his disciples is only when the case arises after majority, and not when it arises during minority; because during minority the guardian's admission is binding without a difference, and the minor's admission or denial is of no avail *on account of the disability arising from minority*). But the correct view is, that the difference (between Aboo Hañeefa and his disciples) exists where the guardian (that is, of the minor boy and the minor girl) admits (the marriage) whilst they are minors, but the minor boy or the minor girl denies the marriage after attaining majority; then (in this case the question is, whether the admission of the guardian is to be accepted) the admission of the guardian will not be accepted (according to Aboo Haneefa, whilst according to his disciples it shall be accepted). And (in the case of the male slave mentioned above) if the slave denies (the marriage) whether (the denial is) before freedom is obtained or after it, the admission of the master (that he has given the slave in marriage) shall not be valid as against the slave according to Aboo Haneefa on whom be peace (whilst according to his disciples it shall be accepted).

1023. (123). And silence of a virgin (*i. e.*, a woman who has not been before married) is held to be consent, when the guardian asks for her consent before marriage: and so also (her silence is consent) when the guardian has given her in marriage and then gives her information of the fact: so also (her silence amounts to consent) when the guardian sends a messenger to her either to ask for her consent (to the marriage) or to give her information (of the marriage).

1024. (124). And in the matter of messenger (in the case last mentioned where the guardian sends a messenger) the number, or the quality of being just, is not a condition (that is, it is not necessary that the messenger sent by the guardian should be more than one, or that he should be righteous or just): but if the information is conveyed by a Fazoolee (stranger or volunteer), then number is necessary as also the quality of being just (or righteous); (that is, the condition is, that there should be more than one, and that they should be just and righteous).

1025. (125). And the silence of a *Syeeba* (a married woman whether she has had intercourse or not) does not amount to consent (in regard to her second marriage): but if she has become a *Syeeba* (one who has lost her virginity) by jumping or by excessive use of pieces of earth in purifying herself after urinating, or by reason of advance of age, then her silence is consent (because not having been married before, she is to all intents and purposes a *Bakira* or virgin): and so also (her silence is consent) if she (not having been married before) becomes a *Syeeba* (*i. e.*, looses her virginity) by reason of *Zina* (or whoredom) according to Aboo Haneefa, on whom be peace: and if she becomes a *Syeeba* (or looses her virginity) by reason of intercourse on account of marriage or on account of doubt in marriage (that is, doubtful marriage, *e. g.*, where the marriage takes place without witnesses) or on account of being the property of another, then her silence will not be consent (because here she is in reality a *Syeeba*): and if her husband has met her (that is, if there has been *Khilwut Suheeh* or proper meeting, that is to say, valid retirement) and then separation has taken place between them, and the woman says, "My husband has not had intercourse with me," she shall be given in marriage in the same way as virgins are married (that is, in regard to consent and other matters, she shall be treated as a virgin, and the rules relating to virgins shall apply to her).

1026. (126). And if she (a virgin) has been given in marriage by a distant guardian (that is, when a nearer guardian is present) and she comes to know of the marriage, and keeps quiet, then her silence will not amount to consent, when the near guardian is not absent in a way so that his absence might be called *Ghybut Moonkutaiú* (or absence which prevents communication between her and the near guardian; that is, if the near guardian is not at hand in the way abovementioned, and the distant guardian has, in consequence, given her in marriage, then her silence amounts to consent: not otherwise).

1027. (127). And if the father of a virgin (or *Bakira* who has not been given in marriage whether she has had connexion or not) is a slave, and she has been given in marriage by her brother who is a free man, and then she comes to know of the marriage and keeps quiet, her silence is consent (because the father being the property of another has not the capacity to become a guardian. See Futawai Alumgiree, Vol. I, p. 400, line 21: and consequently the brother is the near guardian).

1028. (128.) And the Kazee, in the event of there being no guardian (of a woman) is in effect the guardian in matters of marriage.

1029. (129). If the guardian gives a *Syeeba* (one who has been already married whether she has had intercourse or not) in marriage, and she in her mind approves of the marriage but does not express her approval by word of mouth, she is at liberty afterwards to repudiate the marriage, and her mental approval will not be taken into consideration. In the case of a *Syeeba*, what is to be taken into consideration is her consent only when expressed in words or acts which denote consent, for instance (her *Tumkeen* or) offering no obstacle to the husband having intercourse with her, or asking for her dower or accepting her dower: but her acceptance of a present does not come within acts which denote consent.

1030. (130). And so also in the case of a male, who has attained majority (that is, if an adult male has been given in marriage, the same rules as to consent apply in his case as have been set forth above, that is, a mere mental acceptance of the marriage is not sufficient; on the other hand, the consent must be given by word of mouth or expressed in acts which denote consent).

1031. (131). When witnesses question a woman (who is a virgin) who has attained puberty, regarding her consent to (the proposed) marriage without seeing her face, and she keeps quiet, and does not refuse her consent to the (proposed) marriage, the marriage shall be valid as between God and man, (the marriage shall be binding morally as far as the Kazee is concerned). And if the woman (subsequently, that is, after the marriage) denies her consent (having kept quiet when asked by the witnesses and the marriage having consequently taken place), it is not allowable to the witnesses to give evidence that she had consented unless they had seen her face and questioned her and she had kept quiet if she had been a virgin (unmarried whether she had had connexion or not) or she had expressed herself in words if she had been a *Syeeba* (a married woman whether she has had connexion or not).

1032. (132). If a *Syeeba* has been given in marriage without her consent in words, for a thousand *dirhems*, and she then receives intelligence (that she has been given in marriage) and she says, "I have allowed the marriage for 50 *dinars* (or gold mohurs)" or she says, "I have allowed the marriage on condition that the dower be increased by so much" or she says, "I do not allow the marriage *unless* so much is superadded to the dower," this is not repudiation of the marriage, and her marriage is not avoided (*batil*) (because the marriage being dependent on her ratification,

having been contracted by a Fuzoolee, what she says amounts neither to ratification nor repudiation of the marriage) : so that if she allows (or ratifies) the marriage after that (for the dower named, that is, a thousand *dirhems*), her allowing (or ratifying) the marriage is valid : but if she says, "I do not allow this marriage *but that* you must increase (the dower) for me," this is repudiation of the marriage.

1033. (133). A boy who is about to attain his majority marries a woman (who has attained puberty) without the permission of his father and has intercourse with her : the father then receives intelligence (of the marriage) and he (the father) repudiates the marriage. It is laid down by the learned that the (marriage is void but the) boy is not liable to punishment (hudd) or to the payment of (Ookr or) such dower as the husband is bound to pay in the event of his having connexion by means of an invalid (or *fasid*) marriage : he is not liable to punishment (or hudd) because he is a boy, and he is not liable to pay the aforesaid dower (Ookr), because when the woman (who has attained her puberty) gave herself in marriage to him with the knowledge that the marriage is not effectual (in consequence of the minority of the boy) she verily agreed to forego her right.

1034. (134.) A slave marries a woman without the permission of his master; he then says to her, "there is no necessity for me for this marriage." His marriage shall become void: (*i.e.*, before the marriage is validated by the permission and ratification of the master, the slave resiles from the marriage which for its validity is dependent on the master's permission: in a marriage which is not absolute but dependent, either party has a right to withdraw before the marriage becomes absolute. See paragraph 113). And if (the slave says nothing) the master says, "I have not consented and not permitted" or "I hold it abominable (or bad)," it is said in the Moontuka from Aboo Yusoof, this is repudiation (by the master) of the marriage of the slave.

1035. (135.) And also, if a virgin (an unmarried woman) says (in case she is of age and has been married without the guardian's permission) as follows, in one sentence : "I do not consent, but (*i.e.*, *lâkin*) I do consent," the *Nikah* shall be valid by analogy (that is, if she had said, "I do not consent," and kept quiet, the marriage would have become void ; but she having in continuation of the same sentence expressed her consent, the latter sentence, *i.e.*, "but I do consent," nullifies the effect of the first sentence).

1036. (136.) A man makes a proposal for the marriage of a virgin (who is of age) to her father: the father says (in Persian) "I have to marry my son (instead of saying marry my daughter) whatever he does is agreeable to me;" then the son gives his sister (that is, the daughter of the person to whom the aforesaid proposal was made) in marriage: then the daughter receives intelligence (of the marriage) and she keeps quiet: then the father gives the woman (his said daughter) in marriage to another man, and the woman receives intelligence of this (second) marriage and keeps quiet: the marriage contracted by the father is valid; because the brother is not the (proper) guardian (when there is a father): therefore, her silence as regards the marriage contracted by the brother is not consent. (Because silence is consent only when the marriage is contracted by the near guardian. See paragraph 126).

1037. (137.) If a minor boy or a minor girl should marry himself or herself without the permission of the guardian, and then they attain majority, the marriage contracted by them is not valid unless they ratify the same after attaining majority.

1038. (138.) A male slave (who is of age) or a female slave (who is of age) marries himself or herself without the permission of the master, and afterwards they are set free: their marriage is valid without (the necessity of a) permission (of the master).

Section IV.

ON MARRIAGE OF SLAVES.

1039. (139.) The marriage of a slave, or of a male or female Mookatub or male or female Moodubbur, or of a Oomm-i-Walud, is not valid without the permission of the master: and so also that of a Motuk of a fraction (for example, if a moiety or a fourth of her person, is stipulated to be free) according to Aboo Haneefa, on whom be peace.

1040. (140.) And (according to one tradition from Aboo Haneefa) it is valid for a master to give his male slave in marriage without the permission of the latter, although he (the slave) might be old (*i.e.*, of age); in the same way as it is valid for the master to give his female slave in marriage (without her permission). And it is reported from Aboo Haneefa, on whom be peace! according to another tradition, that the master has no authority to compel his male slave to marry (that is, to give him in marriage without his permission), and this is the rule which obtains accord-

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ing to Shafei. (Compare paragraph 122, where the rule laid down is in accordance with this second tradition from Aboo Haneefa.)

1041. (141.) And it is not valid for the master to give his male or female Mookatub in marriage without their consent, although they might be minors (because the Mookatub has the right of earning his freedom). (For Reason, see Rud-ool-Mooktar, Vol. II, p. 619.)

1042. (142.) And if the master gives his female Mookatuba, who is a minor, in marriage without her permission, and she then becomes free (*i.e.*, she then earns her freedom), the marriage so contracted by the master shall not become void (or *batil*, after her freedom); but the same shall not become valid except with the permission of the master (*i.e.*, she being still a minor; because the master must be considered her guardian); but if she is unable to earn her freedom, the marriage contracted by the master shall become void by reason of her inability to make herself free. (Compare paragraph 118).

1043. (143.) And if the master gives in marriage his male Mookatub who is a minor, to a woman without his permission, and the male Mookatub then becomes free (*i.e.*, earns his freedom) or is unable to get himself freed (*i.e.*, is unable to earn his freedom) the marriage contracted by the master shall not become void (*batil*), but the same shall not become valid without the permission of the master. (Compare paragraph 142.)

1044. (144.) And the dower which becomes due to the female slave or female Moodubbur, or to the Oomm-i-Walud by reason of marriage or by reason of intercourse in case of doubt in marriage, is the property of the master.

1045. (145.) And the dower due to the female Mookatuba, or to the female Mootuka who is free in fraction, is her property, and not the property of the master.

1046. (146.) And if dower is due against a male slave, who has married with the permission of the master (that is, if the dower has become due, not having been paid by the slave or by the master, and the wife demands her dower), then the slave shall be sold (for the liquidation of the dower, again and again, until the dower is paid).

1047. (147.) And what (on account of dower) is due against a male Mookatub or against a male Moodubbar, they shall themselves exert for it (*i.e.*, to pay the same, and they shall not be sold on that account).

1048. (148.) And what (on account of dower) is due against a male slave (who has contracted a marriage) without the permission of the master, *the liability regarding* the same shall appertain to the slave after his freedom.

1049. (149.) And it is not valid for a man to give in marriage a male slave of his minor son, but it is valid for him to give in marriage the female slave of his minor son (because the minor son being under his guardianship, he is not authorised to give the minor's slave in marriage, which will entail loss to the son by making him liable for dower and maintenance, but he may well give in marriage the minor's female slave which will be to the minor's benefit, as he will be the owner of the dower).

And the paternal grandfather is like the father (in this matter) : and so also is the executor or the Kazee : and so also is the Moofawiz in the Moofawiz property : (a partner who has purchased a male slave as the partnership property, cannot give the slave in marriage, but if he has purchased a female slave he can give her in marriage) : but if the partner is so by way of *Inan* or partnership, or if he is Moozarib, then he is not entitled to give (even) the female slave in marriage, according to Aboo Haneefa and Mahomed, on whom be peace ! and so also the Mazoon (or permitted) slave, or the Mookatub, has no authority to give in marriage (even) the *female slave. God knows best.*

Section V.

ON THE AVOIDANCE OR CANCELLATION OF THE CONTRACT OF MARRIAGE PERFORMED BY THE FUZOOLEE.

1050. (150.) *A man gives another man in marriage to a woman* without his permission; it is not competent to the former to cancel (Fuskh) the marriage, according to the earlier view taken by Mahomed and Aboo Yusoof, on whom be peace, but according to a later view taken by them, he is competent to cancel the marriage.

1051. (151.) Those who contract marriage are divisible into four classes in relation to (the power of) cancellation of marriage : (First) A contractor (*i.e.*, a person who contracts a marriage) who has no power to cancel (the marriage)—*neither by word of mouth nor by acts*,—and he is a Fuzoolee (or volunteer). When a Fuzoolee gives a man in marriage to a woman without his permission, and then says, " I have cancelled

(this marriage)," the marriage shall not be cancelled. And so also, if the Fazoolee (having given a man in marriage to a woman) gives him in marriage to the sister of the same woman, then this second marriage is a dependent marriage, (depending on the consent of the husband, and is not a void marriage); and it (*i.e.*, the second marriage) will not operate so as to make the first marriage void (and this is an instance where the contract entered into by the Fazoolee is not rendered void by his act). (A man cannot marry two sisters; therefore when the Fuzoolee gives a man in marriage to two sisters in succession, both marriages are dependent on the consent or ratification of the husband; if he ratifies one marriage, the other is avoided).

1052. (152.) (Second)—A contractor who is able to cancel the marriage by word of mouth and not by acts, and he is the Vakeel. A man appoints another his Vakeel in order that the latter might marry him to a woman named: The Vakeel (accordingly) gives the man in marriage to that woman and on her behalf the contract is accepted by a Fazoolee: in this case the Vakeel is entitled to cancel the marriage by word of mouth (because the contract was obligatory on the side of the husband, and on behalf of the wife the contract is dependent: the marriage is therefore, on the whole, not operative: if so, either party is at liberty to resile from it, or cancel it). And if he (the Vakeel) should (after the marriage so contracted as aforesaid) give him in marriage to the sister of the woman named, then the first marriage is *not cancelled* (by this subsequent act of the man appointed as Vakeel in the manner aforesaid, for the purpose of marrying the man to a woman named; the Vakeel's authority was to give the man in marriage to a woman certain: when therefore he gives him in marriage to another and a different woman, he is a Fuzoolee in regard to the husband, and as such he is not entitled to cancel the marriage by acts).

1053. (153.) (Third)—A contractor who is entitled to cancel by act and not by word of mouth; and that is, in this wise: a man gives a man in marriage to a woman without his permission, (and there has been no ratification of marriage): then the husband appoints him as his Vakeel for the purpose of giving him in marriage to some woman un-named: the Vakeel accordingly gives him in marriage to the sister of the woman (referred to above); the first marriage is cancelled: (the first marriage is dependent on the permission of the husband, and is, therefore, not operative while the second is authorised by the husband and is accepted by the woman

in a binding manner, and is, therefore, operative, and it cancels the first); and if the Vakeel should cancel the first marriage by word of mouth then his cancellation is not valid.

1054. (154.) (Fourth)—The fourth class consists of a contractor who is entitled to cancel the marriage both by word of mouth and by acts: and that is in this wise: a man appoints another as his Vakeel with a view that he (the Vakeel) might marry him to a woman un-named, and the Vakeel accordingly gives him in marriage to a woman on whose behalf a Fazoolee accepts the marriage: then if the Vakeel cancels the marriage (by word of mouth) the cancellation by him is valid: and if he (the Vakeel) gives him (the husband) in marriage to the sister of that woman (to whom he had first married the man), the first contract shall be cancelled (if the second contract of marriage has been performed in a way so that it is operative and not dependent; because the second marriage being operative at present, and the first marriage being a dependent marriage, what is at present lawful, that is *Hill-i-bat*, is stronger than *Hill-i-moukoof*, see paragraph 118).

SECTION VI.

ON AGENCY (IN MARRIAGE).

1055. (155.) A man, having a son who has a daughter, compels his (said) son to appoint him (the father) Vakeel (or Agent) for the marriage of his (the son's) daughter: the son then says, "I am disgusted with thee and with being thy son, do whatever thou likest": the father then goes and gives his son's daughter in marriage. Sheikh Ool Imam, Aboo Bakr, Mahomed, son of Fuzul, on whom be peace! says, this marriage is not valid for various reasons, one of which is this: when the son, in the matter of his daughter being given in marriage, said, "Do whatever thou likest," then these words are ambiguous (and susceptible of various meanings): one meaning, of which they are susceptible, is that by those words he (the son) intends to refuse (to vest his father with authority) although the father might deem it (*i.e.*, the refusal) abominable: and (secondly) those words shall not be deemed to import the appointment of an agent, having been pronounced at a time of passion (or anger): and (thirdly) such words as these are not intended to create something definite (that is, fix the authority in the father); God says "then whoever wishes, he may believe and whoever wishes he may remain an infidel:" (this does not show that infidelism was permitted and allowed by God).

1056. (156.) The paternal uncle says to the daughter of his brother, the daughter being a Syeebah (a married woman): "Verily do I intend to give thee in marriage to so and so;" the woman then says "it is right" (or very well), and then when the paternal uncle separates from her, she says "I do not consent;" but the paternal uncle does not know this (that she said so): and the paternal uncle gives her in marriage: the marriage by him is valid according to Aboo Haneefa, on whom be peace! because the paternal uncle is like a Vakeel, and his authority does not cease without his knowledge (that his authority has been put an end to).

1057. (157.) A woman who has attained her puberty appoints a man her Vakeel for the purpose of giving her in marriage to so and so for a thousand *dirhems*: the Vakeel gives her in marriage for five hundred (*dirhems*): then, when she is informed of it, she says, "I am not pleased with this marriage, on account of loss of dower:" then it is explained to her that "nothing will be done by the husband but what she has in view:" she then says "I agree (to this marriage)." The lawyer Aboo Jaffer, on whom be peace! says this marriage is valid, because her words that she is not pleased (with the marriage) do not constitute a repudiation of the marriage; and then when she agrees to the marriage after this, her ratification relates to a marriage which is dependent (on her consent and not to a marriage which is void because she did not say "I avoid the marriage):" therefore her permission is valid.

1058. (158). A man directs another man to sell his slave for one-hundred *dinars* (gold mohurs): and the person so directed sells him for a thousand *dirhems* (*i.e.*, for less than a hundred *dinars*): and then tells the person who had so directed, "I have sold the slave" (without saying for how much) and the (former) master (of the slave) says, "I have permitted." It is said in the Moontuka that the sale is valid for one thousand *dirhems*. And this principle obtains in *Nikah*. But if the person who had given the direction says at the time when the person authorised gives him information of the sale, "Verily have I permitted thee for the price I authorised thee," then the sale by the person authorised will not be valid (for a lesser price).

1059. (159.) A man appoints another Vakeel on his behalf for the purpose of giving him in marriage to so and so: then the Vakeel himself marries the woman (instead of marrying her to his client): the marriage by the Vakeel for himself is valid. On the contrary, if a Vakeel is appointed

to purchase a thing certain (for the client), and he purchases it for himself, the purchase itself is valid, and the Vakeel shall not be the purchaser for himself; (and there is no inconsistency in the two things, *viz.*, that the purchase should be valid, and the client should be considered to be the purchaser); because the Vakeel with authority to make the purchase, stands to his client in the same relation as the seller stands to the purchaser, (and the case must be regarded) as if the Vakeel purchased for himself and then sold to his client, for property which is owned (*i.e.*, Milk-i-Yumeen as contradistinguished from Milk-i-Moota) is susceptible of transfer from him (the Vakeel) to another; (that is, the Vakeel can be regarded as a Trustee): and this (susceptibility of transfer from one to another) is not possible of application in regard to a Vakeel for marriage; because a Vakeel is an ambassador or messenger; and (it is clear that) a messenger has the capacity to purchase for himself. Then if the Vakeel (in the case aforesaid having married for himself) lives with the woman for a month and has intercourse with her, and he then divorces her and her *iddut* expires, and he then gives the woman in marriage to his client, it is valid for the Vakeel to give the woman in marriage to his client.

1060. (160). A sick man (Mureez) whose tongue (speech) is not clear (on account of weakness or approach of death) is asked by a man, " Am I Vakeel for the marriage of thy daughter so and so : " the sick man says in Persian " Yes," without adding anything further; the man shall not be Vakeel: because the word " Yes," of the sick man is ambiguous (and implies various suppositions): it might imply the making of Vakeel at present (that is, present delegation of authority), or it might imply the making of Vakeel at some future time, or it might imply hesitation and consideration, that is (it might amount to saying) " Yes, I will make you Vakeel." Therefore the man shall not become Vakeel by reason of the doubt.

1061. (161). If a man appoints another his Vakeel for the purpose of giving him in marriage to a woman: the Vakeel then gives him in marriage to his own daughter: then, if his daughter is a minor, the marriage is not valid according to all the three Imams (that is, Aboo Haneefa, Aboo Yusoof, and Mahomed, because the authority referred to a woman, and here the Vakeel married the person to a minor): but if she has attained puberty, then, according to Aboo Haneefa, on whom be peace! the same result follows (because the authority impliedly excluded the Vakeel's daughter) but according to the two Sahibs (Mahomed and Yusoof)

the marriage is valid. And if the Vakeel gives him in marriage to his sister (who has attained her puberty. See Fatawai Alumgiree, Vol. I, pp. 415 and 416), then the marriage is valid according to all (because the sister is not so closely related as the daughter and comes within the authority conferred).

1062. (162.) A Vakeel appointed by a woman (who authorises him to give her in marriage) gives her in marriage to his own father or son, this marriage is not valid according to Aboo Haneefa.

1063. (163.) If a Vakeel for marriage on behalf of a woman gives her in marriage to one who is not her Koofoo, then some of the learned have said that the marriage is valid according to Aboo Haneefa, on whom be peace! and not according to the two Sahibs (Mahomed and Yusoof) on whom be peace! and some of the learned have said that the marriage is not valid according to all (three), and this view is correct. But if the person to whom the woman has been given in marriage by the Vakeel is of the same Koofoo, but he be blind or a cripple or a minor, or an idiot, the marriage is valid, and so also if he be a eunuch or impotent.

1064. (164.) And if a man appoints another man a Vakeel for the purpose of giving him in marriage to a woman, and the Vakeel gives him in marriage to a woman who is blind, or who has lost sensation of touch, or whose female part has closed and lost capacity of intercourse, or who is insane, or who is a minor, whether fit for intercourse or not, or who is a free woman or a slave, or who is of the same Koofoo, or not of the same Koofoo, or who is a Mooslima or a Kitabya, the marriage is valid according to Aboo Haneefa, on whom be peace!

1065. (165.) And if a man appoints another man his Vakeel for the purpose of giving him in marriage to a slave, and the Vakeel gives him in marriage to a free woman, the marriage is not valid; but if he gives him in marriage to a Mookatiba or Moodubbura, or an Oomm-i-Wulud, the marriage is valid; because for the purposes of marriage they are like slaves.

1066. (166.) And if a man appoints another man his Vakeel for the purpose of giving him in marriage to a woman, and the Vakeel gives him in marriage to a woman as regards whom the husband (the client) had made a vow that she shall be divorced if he were to marry her, or gives him in marriage to a woman with whom his client had made Eela, or to a woman who is in the *iddut* of his client, the giving in marriage by the Vakeel is valid.

1067. (167.) And if the Vakeel gives his client in marriage to a woman, who is already married to another, or who is in the *iddut* of her former husband, whether the Vakeel knows all this or does not know it, and the husband has intercourse with the woman in ignorance of all this, then they (the husband and wife so married) shall be separated, and the husband shall be liable to the smaller amount of (the two amounts, *viz.,*) the dower named and the Meher-i-Misl; because what is due in a *fasid* (invalid) marriage is the smaller amount of the (two, *viz.,*) dower and Meher-i-Misl: and the husband shall not be entitled to look to the Vakeel for satisfaction (that is, he shall not make the Vakeel liable for the amount).

1068. (168). And the same rule holds good (as aforesaid) if the Vakeel gives his client in marriage to the mother of his client's wife, (that is, they shall be *immediately* separated with like rule as to dower).

1069. (169.) A man sends another man to make proposal for him to a woman named (and not to give him in marriage to that woman), and the messenger goes and gives him in marriage to that woman: this marriage is valid: because he had directed him to make a proposal, and marriage is the completion (or fruition) of the proposal.

1070. (170.) And if a man appoints another man his Vakeel for the purpose of giving him in marriage to a woman, and the Vakeel (does so and) gives him in marriage to a woman, and then there arises a difference between the husband and the Vakeel, the former saying to the Vakeel, "Thou hast given me in marriage to this woman," and the Vakeel says, "No, on the contrary, I have given thee in marriage to that other woman," then the word to be accepted is that of the husband if the wife (referred to by the husband) testifies to the word of the husband in this matter, (saying it was me with whom marriage was effected; because both the husband and the wife mutually support each other in the matter of the marriage, and, therefore, the marriage shall be proved by their mutual support: and this rule shews the principle that marriage is proved by mutual support. (Compare paragraphs 14, 15 and 16).

1071. (171.) And if a man appoints another his Vakeel for the purpose of giving him in marriage to so and so, or so and so, then to whomsoever the Vakeel gives him in marriage, the marriage is valid, and the appointment (as Vakeel) shall not be rendered void by such (slight) ambiguity: and if the Vakeel gives him in marriage to both of them by one contract, the marriage with neither of them shall be valid, in the same

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way as if he had appointed a man Vakeel for the purpose of giving him in marriage to one woman, and the Vakeel gives him in marriage to two women by one contract: (if the marriages are by two contracts, then the first marriage is valid and the second not; because the Vakeel's authority terminates with the first marriage).

1072. (172.) And if a man appoints a Vakeel for the purpose of giving him in marriage to a woman, and the same man then appoints another with the same authority: and one of the two Vakeels gives him in marriage to a woman, and the other Vakeel gives him in marriage to the sister of the woman (to whom the first named Vakeel had given him in marriage); then if the marriages had taken place in succession, the first marriage is valid; but if both marriages had taken place at one and the same time, both the marriages are void.

1073. (173.) A man says to another, "Give me in marriage to a woman, and when thou hast done this, then her authority (to divorce) shall be in her hands": the Vakeel gives him in marriage to a woman without stipulating with her for the authority (aforesaid), the authority (to divorce) shall be in her hands. But if he had said, "Give me in marriage to a woman, and stipulate with her that when I shall marry her (that is, stipulate with her that when the marriage is effected) the authority (to divorce) shall be in her hands," and the Vakeel (merely) gives him in marriage (without making such a stipulation) to a woman, she shall not have the authority (to divorce) unless the Vakeel had made such a stipulation: because the husband did not personally enter into the stipulation regarding the authority to divorce, but entrusted to the Vakeel the making of the stipulation: contrary to the first case (where instead of asking the Vakeel to contract the marriage with that condition, he himself had said that on marriage the authority to divorce shall be with the wife).

1074. (174.) If a woman appoints a man as her Vakeel for marriage, and the Vakeel adds a condition against the husband that, in the event of his marrying her, the authority (to divorce) shall be with her, and then gives the woman in marriage to him, the marriage shall be valid, but the authority (to divorce) shall not be with the woman at the time (or by reason) of that marriage.

1075. (175.) If a man appoints another man as his Vakeel for the purpose of giving him in marriage to so and so, then if that woman has

(already) a husband (at the time of the appointment of the Vakeel) and the husband dies (at the time the Vakeel gives him in marriage to her) or her husband divorces her, and her *iddut* expires (at the aforesaid time) and then the Vakeel gives him in marriage to her, the marriage is valid.

1076. (176.) A man appoints another as his Vakeel in order that he may give him in marriage to so and so: then the client himself marries her, and then divorces her by means of a *Bain* (or irreversible) divorce: the Vakeel has no authority to give him in marriage to her (because of the special authority which had been given to the Vakeel, but if the Vakeel had married her to himself and then divorced her, and then given her in marriage, it would have been valid, see paragraph 159).

1077. (177.) A woman appoints a man her Vakeel for the purpose of giving her in marriage, the Vakeel then gives her in marriage for a dower which is either legal or which is illegal (*e.g.*, wine, &c.), or the Vakeel makes a gift of her to a man in the presence of witnesses (that is to say, gives her in marriage without dower by using the word Hiba), or makes Sudka of her to a man (that is, gives her in marriage without dower by using the word Sudka), this marriage is valid: and if the woman marries (herself, without the intervention of the Vakeel), before the Vakeel shall have given her in marriage, the Vakeel's authority comes to an end.

1078. (178.) A woman having a husband, says to a man, "Verily shall I make Khoola (a form of divorce) with my husband, and when I shall have done this and my *iddut* shall have expired, then do thou give me in marriage to so and so," this is valid, and according to what she says (that is the Vakeel's authority is valid, and if he gives her in marriage accordingly, the marriage shall be valid).

1079. (179.) If a woman or a man appoints two men as Vakeels to give in marriage, or to effect Khoola (divorce for consideration) or in lieu of property to make a slave free, and one of them acts (singly), this is not valid. But if two persons are appointed Vakeels to give divorce or to make a slave free not in lieu of property, and one of them acts (singly), this is valid.

1080. (180.) The Vakeel for marriage is like a messenger, and has no authority to take possession of the dower of the woman: and so also the guardian of a woman who has attained her puberty (has no authority to take possession of the dower of the woman), unless he is the father or paternal grandfather who has, by analogy, authority to take possession of the

dower of a woman who has attained her puberty when she is a virgin (a woman who has not already been married whether she has had intercourse or not: so that if she is a *Syeebah,* or already married, no guardian has such authority).

1081. (181.) If a man appoints another man as his Vakeel for the purpose of giving him in marriage to so and so for one thousand *dirhems,* and the Vakeel gives him (the client) in marriage to that woman for two thousand *dirhems,* then if the husband allows such marriage (for two thousand *dirhems*) the marriage is valid, but if he repudiates the same, it will be void (*batil*). And if the husband is ignorant of the fact (that the Vakeel had given him in marriage for two thousand when he had authorised him to do so for a thousand) so much so that he has carnal intercourse with her, then his option still holds good; if he permits (the marriage for two thousand), then he is liable for the dower named, (*viz.,* two thousand) and not anything else (*i.e.,* proper dower), but if he repudiates it (the marriage for two thousand he having had sexual intercourse) the marriage shall be void, but he shall be liable for the Meher-i-Misl (or proper dower) if the same (the Meher-i-Misl) is less than the dower named (the two thousand); if not (that is, if the Meher-i-Misl is not less than the dower named), he shall be liable for the dower named: but if (instead of ratifying the marriage for the increased dower or repudiating it for such dower) the husband does not consent to the increased dower (and objects simply to the dower and *not to the marriage*) and the Vakeel says, "I will give compensation to the extent of the increase, but I shall render the marriage binding," the Vakeel has no authority to do that (and the husband shall be bound either to ratify or repudiate the marriage as a whole).

1082. (182). A woman appoints a man as her Vakeel with authority to act in the matter of her affairs, and the Vakeel gives her in marriage to himself, the marriage shall not be valid: because (even) if the woman had appointed him Vakeel for the purpose of marriage, it was not competent to him to marry her to himself; so also with greater force here.

1083. (183.) A man appoints another man his Vakeel for the purpose of giving him in marriage to a woman so that the marriage should be an invalid (or *fasid*) marriage, but the Vakeel gives him in marriage to a woman by way of a valid (or *jaiz*) marriage; the marriage is not valid; because an invalid marriage is no marriage at all, and it will not create any of the obligations of marriage (*e.g.,* liability to dower and

maintenance, or the like), and for this reason, if a man makes a vow saying "(by God) I will not marry," and then marries by way of an invalid (*fasid*) marriage, his oath is not broken : but this rule is contrary to what obtains in the case of a sale, in which case, if a man appoints a Vakeel for the purpose of effecting an invalid sale, and the Vakeel concludes a valid sale, the sale is valid (or binding) according to Aboo Haneefa, on whom be peace ; because an invalid sale is (also) a sale which creates the consequences (or obligations and rights) of a sale (after possession) which is ownership : and an invalid sale is included within a vow relating to sale, and the person who makes the vow breaks his oath by (entering into) an invalid sale.

1084. (184.) A woman appoints a man as her Vakeel in order that he might give her in marriage for four hundred *dirhems* : the Vakeel then gives her in marriage (for a dower, the amount of which is not known to the woman, who is under the impression that the amount was four hundred *dirhems*), and the woman lives with her husband for a year : then the husband puts forth (or discloses) that the Vakeel has given her in marriage to him for one *dinar* (gold mohur), and the Vakeel corroborates him in this matter : then if the husband admits that the woman had not appointed the Vakeel for (the purpose of giving her in marriage for) one *dinar*, the woman shall have the option, and if she likes she may permit (or ratify) the marriage for one *dinar*, in which case she shall not be entitled to more than one *dinar*, and if she likes, she may repudiate the marriage, in which case she shall be entitled to get from her husband, her Meher-i-Misl (or proper dower), whatever the amount of the Meher-i-Misl might be (whether more or less than four hundred *dinars*), contrary to the rule in what has preceded (in paragraph 181), because in that case (*viz.*, the case in paragraph 181), the woman agreed to the amount named (and therefore cannot get a higher amount if her proper dower was higher than the dower named), and therefore when the marriage was avoided (or broken) and consequently the Ookr (or such dower as becomes due on account of intercourse in case of an invalid or dependent marriage) has become due on account of intercourse, no increase shall be made over what she has agreed upon : and in the present case (*viz.*, the present case where she had authorised marriage for four hundred *dinars*, and the dower fixed was one *dinar*) the woman did not agree to the dower named at the marriage ; and she is, therefore, entitled to the Meher-i-Misl, whatever the amount of the Meher-i-Misl might be : and she will not be entitled to maintenance during the *iddut*, because *iddut* does not become obligatory

(in the present case) by the marriage (as in ordinary cases it does become obligatory by the marriage), but it becomes due (in the present case) by reason of carnal intercourse (not in a valid marriage but) in a doubtful marriage; and therefore maintenance shall not be obligatory on this *iddut*. And if the husband avers that the appointment of the Vakeel was (to give her in marriage) for one *dinar*, and the woman denies this, then in the same way her word shall be accepted with her oath, (and the result will be the same as in the above case, and she will either have to ratify the marriage for one *dinar* or repudiate it).

And in this matter caution is necessary: it is proper that the Vakeel should have the woman's authority witnessed, and he should inform her after marriage, if he has acted contrary to the authority given by her.

1085. (185.) And in the same way the guardian, if the woman has attained puberty, should act as (it is proper that) the Vakeel should act.

1086. (186.) The Vakeel of a woman, for a dower named, gives her in marriage, or the father for a dower named, gives in marriage his daughter, whether she has attained puberty or not, then the Vakeel or the father releases the husband from the whole or part of the dower, and stipulates for compensation personally (saying I will give compensation if the wife shall demand the amount in respect of which he so releases), then the gift and release shall not be valid, unless the woman permits (or allows) the release, if she has attained puberty: and the (aforesaid) stipulation to give compensation is void, because if he (the Vakeel), enters into a stipulation (*Kufalut*) for the woman, saying, "If the woman shall not consent and shall insist, I stand surety to the husband for what the woman shall demand;" it is clear that the suretyship is void (because in a case of valid suretyship, the woman must accept the suretyship, and the woman in this case has not accepted it).

1087. (187.) A man says to another, "If so and so takes from thee the debt, which thou owest to him, then I am surety for the same:" if he intends thereby suretyship for the woman, saying, "If thy wife demands from thee, I am surety to her, and I will pay her from my property"—and this is suretyship for the woman—and the woman is absent, then this is not valid according to Aboo Haneefa and Mahomed, on whom be peace, unless somebody present on behalf of the woman accepts the suretyship in the (same) meeting. And the device to make the suretyship valid, if the woman has attained her puberty is, that the Vakeel or guardian shall say

"Verily the woman has authorised me to make a gift or release, and if she denies the same and takes from thee, without having any right (having authorised me to make the gift or release) I am surety to thee for this," then this suretyship is valid : and if she is a minor, then it is said that in order to effect a device, which shall be valid according to the opinion of all the three Imams, for the purpose of preventing liability to the husband, the father should say at the time of the marriage in Persian (or Arabic, &c.),—" I have given my daughter so and so to thee in marriage for two thousand *dirhems*, so that five hundred *dirhems* shall be thine," and this is valid, and this expression (*i.e.*, so that five hundred *dirhems* shall be thine) shall be taken to have been used by way of exception; just as if he had said "I have given my daughter in marriage for two thousand but (or minus) five hundred *dirhems*"; this is valid according to all (the three Imams). And in the same way as regards the Vakeel. And another device is, that the father of the minor daughter should purchase from her husband after marriage some thing moveable, of which the value is small, for a price equivalent to the amount which he wishes should be dropped out of the dower of the female minor (due) from the husband : thus the father (having accepted the thing sold without paying for it in cash) gets credit for the amount of the price of the thing in her dower.

1088. (188.) A man says to another "give in marriage this my daughter to a man who is versed in science and who is religious, by the advice of (*i.e.*, in consultation with) so and so :" And he gives her in marriage to a man endowed with the above quality, but without the advice of that so and so : this marriage is valid; because his object from the advice is, that the marriage should take place with one who possesses this quality : then when his object is attained, there is no need for the advice.

Section VII.

ON KUFAAUT (OR EQUALITY.)

1089. (189.) Kufaaut (or equality) is relevant (and is an element fit for consideration) in marriage, although Malik, on whom be peace, and Soofyan and a party of the Sahabis, may God have mercy upon them, have entertained a different opinion. And it is said of Kurkhy, on whom be peace, that he entertained an opinion similar to that held by the persons named above.

1090. (190.) Then Kufaaut appertains to five (qualities).

1091. (191.) Out of those five that in which there is no difference amongst us (*i.e.*, the followers of the three Imams) is lineage (or Nusub, *i.e.*, descent from father, or, in other words, paternity) that is to say, lineage is considered only so far as marriages in Arabia are concerned; because the Ajamees have lost their Nusub. See Shuruh Vikaya, Vol. II, p. 31. Thus the Kooreish are the *Koofoo* of each other, to whatever tribe they may belong, so that a Kooreish who is not a Hashimy is the *Koofoo* of a Hashimy: and an Arab who is not a Kooreishy is not the *Koofoo* of a Kooreishy: and the Arabs (*i.e.*, the non-Kooreishys) are the *Koofoos* of each other: the Ansarees (those who are of Medina) and the Moohajeerees (those who made Hijrut to Medina) are equal in the quality of Koofooship (that is, if they are not Kooreishys they are just like the rest of the Arabs, there being no superiority). And the freed-men are not the *Koofoo* of the Arabs.

1092. (192.) Another quality relating to *Koofoo* is Islam (the being a Mahomedan). So the Christian woman and the Jewess is not the *Koofoo* of a Mahomedan man; so that if a (Mahomedan) man appoints another (Mahomedan) man Vakeel for marriage, and the Vakeel gives him in marriage to a Jewess or a Christian woman, this marriage is not valid according to Aboo Yusoof and Mahomed; because appointment of a Vakeel, according to them, implies a condition of Koofooship, (that is, the two Sahibs say Koofooship is mutual, and a man must marry a woman equal in rank or *Koofoo* to him, and a woman should also marry a man who is equal to her in rank or is her *Koofoo*, but Aboo Haneefa says that a woman should marry her equal in rank or *Koofoo* and not inferior to her, but a man may marry a woman who is not her *Koofoo* or equal in rank: so that according to him, as according to his disciples, if the woman appoints a Vakeel, the latter must give her in marriage to one of her *Koofoo* or equal in rank, or to one who is superior to her; but if the man appoints a Vakeel, then, according to Aboo Haneefa, there is no such implication, but according to his disciples there is such implication).

And he who has himself accepted the Mahommedan religion, his father not being a Mahommedan, is not a *Koofoo* to him (who is himself a Mahommedan and) whose father, alone (and not other ancestors) is a Mahommedan.

And he whose father alone is (or was) a Mahommedan is not *Koofoo* of him whose father and grandfather are (or were) Mahommedans.

And he whose father and grandfather were in Islam is *Koofoo* to him whose paternal ancestors, up to the tenth degree (or up to any other degree), were in Islam.

1093. (193.) Another quality relating to *Koofooship* is the being in a free state (as contra-distinguished from the state of bondage). Therefore a male slave, in whatever class of slavery he may be, is not the *Koofoo* of a free woman: and in the same way, a freed slave (or *Motuk*) is not the *Koofoo* of a woman who has always been free.

And a man whose father was a freed slave is not *Koofoo* of a woman whose father and grandfather had been in a state of freedom (whether the grandfather had always been free or had been made free).

And a person, whose father and grandfather had been free, is *Koofoo* to one whose paternal ancestors had been free.

And it is reported from Aboo Yusoof, on whom be peace, that one who himself accepts the Mahomedan religion, and one who has been made free, when he acquires qualities of excellence equivalent (or similar) to those which the other party (the wife) possesses by descent, becomes the *Koofoo* of that other.

1094. (194.) Another matter in connection with *Koofooship* is equality of property and wealth (or opulence). According to Zahir-i-Rawayet, this quality is not taken into consideration. So, one who has ability to pay dower and meet the maintenance charge is *Koofoo* to one who is possessed of larger property (according to Zahir-i-Rawayet), and he who has not the ability to pay dower or maintenance is not, according to Zahir-i-Rawayet, the *Koofoo* of a woman who is poor; but according to Hussan, who reports a tradition of Aboo Yusoof, he is her (the poor woman's) *Koofoo*, and ability to pay dower and maintenance is not to be regarded (in considering *Koofooship*): but in another tradition from Aboo Yusoof, ability to pay maintenance shall be considered and not the ability to pay dower (in the case of a poor woman).

1095. (195.) And from some of the Mushaikhs, on whom be peace, it is reported that when the brother of a minor girl gives her in marriage to a boy, who has no ability to pay the dower, and the father of the boy (the husband) is prosperous, and he (the father of the boy) accepts the marriage on behalf of the boy, this marriage is valid; because the boy shall be considered prosperous as regards (the payment of) dower, by reason of the property of his father; but he (the boy) shall not be considered prosperous as regards (the payment of) maintenance (by reason of his father being

owner of property), because fathers do take upon themselves the obligation of (paying) large dower, but they do not take upon themselves the obligation of maintenance recurring periodically. But it is necessary that he whose father is not in a prosperous condition, should have ability to pay dower.

Then there is a difference as to the dower (that is, the difference is as regards the extent of ability to pay dower): some of the learned have regard to the ability to pay the whole of the dower: while others have said that regard is to be had to the ability to pay half of the dower; and in our country (*i.e.*, in Ajam) regard is had to the ability to pay the prompt portion of the dower.

And the learned have also disagreed in the matter of maintenance also (that is, have disagreed as regards what constitutes ability to pay maintenance) although all are agreed that regard is to be had to (ability to pay) maintenance: some of the learned have said that the condition is that the husband should be the master of maintenance for one year: and some have said that he should be master of maintenance for one month: and from Aboo Yusoof it is reported, that, "if the husband has ability to pay the wife's prompt dower, and if he daily earns what is sufficient for her maintenance, then he is her *Koofoo*. And Sheikh-ool-Imam Aboo Bakr Mahomed, son of Fuzul, on whom be peace, has said, "If the husband has ability to pay the prompt amount of his wife's dower, and to pay maintenance for one month, then he is her *Koofoo*." And in case of artisans what Aboo Yusoof, on whom be peace, says, is excellent.

When a man is the owner of one thousand *dirhems* and is (also) a debtor for one thousand *dirhems*, and he marries a woman for one thousand *dirhems*, and her Meher-i-Misl (or proper dower) is also a thousand *dirhems* (so that by no possibility can the woman be entitled to more than a thousand *dirhems*, because if a woman marries for less than her proper dower, her guardian is authorised to compel the husband to increase the amount of dower fixed so as to make up the proper dower, or separate the woman from her husband; see Shurah Vikaya, Vol. II, p. 22), it is said by the learned that this marriage is valid, because the husband is competent to pay the dower from the thousand *dirhems* he has in his hands.

1096. (196.) And according to some (*Dyanut* or) observance of religion (that is, morality) appertains to *Koofooship*. And Aboo Yusoof, on whom be peace, has said, if a *Fasik* (or a man of immoral character) makes a display (of his weak points) by going about (for instance), in a

state of inebriety, he is not the *Koofoo* of a pious (*Saliha*) female who is the daughter of pious people : but if he hides his defect and does not make a display, then he is the *Koofoo* (of such a woman).

And it is reported from Mahomed, on whom be peace, that if the *Fasik* (who displays the looseness of his character) is respected and esteemed by the people, and is, for instance, amongst (that is, of the same rank with) those who hold high places under the King, and the like, then he is the *Koofoo* of the daughters of pious people : and if he is held lightly by the people (that is, if people have no regard or esteem for him), then he is not their *Koofoo*.

And Sheikh-ool-Imam Shums-ool-Ayma Sarukhsy, on whom be peace, says, that there is no report (or tradition) from Aboo Haneefa, on whom be peace, in the Zahir-i-Rawayet in this matter, (that is, on the question whether *Fisk, or immorality* of character, has any bearing on *Koofooship*, and whether the *Fasik* is *Koofoo* or not). And the correct view is that, according to him (Aboo Haneefa), *Fisk* does not prevent *Koofooship*. And some of the Mushaikhs of Balkh have said that a *Fasik* is not *Koofoo* of the daughter of a virtuous (or *Salih, i.e.*, pious) person, whether the *Fasik* is one who displays his bad character or not: and this is the approved view taken by Sheikh-ool-Imam Aboo Bakr Mahomed, son of Fuzul, on whom be peace.

1097. (197.) And one of those (things) which appertain to *Koofooship* (and this is the fifth head) is (particular) profession according to the Zahir-i-Rawayet. It is reported from Aboo Haneefa, on whom be peace, that profession is not fit to be regarded (in the matter of *Koofooship*); and one who is a doctor of animals (Veterinary Surgeon) is the *Koofoo* of one who sells rose-water and otto of roses (or *attar*).

And according to Mahomed and Aboo Yusoof, on whom be peace, and (also according to) one of the two traditions from Aboo Haneefa, on whom be peace, one of a low profession, such as doctor of animals, and one who bleeds people, and the weaver, and the sweeper, and the tanner of skins, is not the *Koofoo* of one who sells rose-water or otto of roses, or one who sells cloth, or the *bazzaz* (one who sells cloth), or the *surraf* (one who deals in coin); and this is correct : because people regard them as low.

And it is said that this difference arises owing to difference of times (that is, at one time, or during the time of Aboo Haneefa, no profession was considered low, while at other times, that is, during the time of his disciples, some professions came to be considered low) : in the time of Aboo Haneefa, on whom be peace, people did not deem any profession objectionable (and regard was had to the goodness of the character of the person

to whatever profession he belonged); but this view was changed in the times of his disciples (the *Sahibs, i.e.,* Yusoof and Mahomed).

1098. (198.) And beauty is not regarded in *Koofooship*.

1099. (199.) There is a difference of opinion as regards *Ak'kl* (sound understanding), and some have said that no regard is to be had to the latter (that is to say, it is not relevant in considering *Koofooship* whether a man is possessed of understanding in a higher or lower degree). And Sheikh-ool-Imam Zahid Ally, son of Mahomed Buzdwee, on whom be peace, has said that one who is versed in religion (*Fukeeh*) is the *Koofoo* of those who are of the Alwee origin (that is, the descendants of Ally, whether by a wife whom he married after the death of Fatema, who are properly called Alwees, or the descendants of Ally, born of his wife Fatema, who are properly called Syuds); because excellence (*Shuruf*) which is personally acquired is superior to the excellence which is inherited.

1100. (200.) When a female Zimmee gives herself in marriage to a man (of a different *Koofoo*), her guardian shall have no right to set aside the marriage except when the inequality is most completely defined, as for instance, where the daughter of the Zimmee King, or of somebody higher than the King (*e.g.,* the high priest), gives herself in marriage to a sweeper or tanner of hides from amongst the Zimmees; and except when the woman has stipulated for a dower egregiously small, then her guardians are authorised to demand the completion of the Meher-i-Misl, or proper dower, or to demand the setting aside of the marriage (that is, in the last case, the guardian is authorized to increase the dower or to avoid the marriage, and in the first case to avoid the marriage).

1101. (201.) When a woman (that is a Mahomedan woman) gives herself in marriage to a man who is not her *Koofoo*, her guardians, of the class called residuary guardians (*Asbat,* which includes father, grand-father, and not those of the class called *Zawee-al-Arham*) are entitled to set aside (or annul and avoid) the marriage: and a marriage shall not be set aside on account of want of *Koofooship*, but (by proceedings taken) before the Kazee; because this matter (that is, want of *Koofooship*) is a principle which has been deduced by *Ijtihad* (or analogy of the Moojtuhids, and is a matter in which they differ, see paragraph 189) and each of the contending parties has some argument in his favor and has some authority to support him, and the difference amongst the contending parties cannot therefore be settled but by the decision of a person who has

authority to settle the dispute (and that person is the Kazee). In the same way as the setting aside of a marriage on account of option of puberty and the repudiation of a thing purchased on account of defect after possession (this is also a matter which must be decided before the Kazee). Therefore this setting aside of the marriage (by the Kazee at the instance of the guardian aforesaid, on account of want of *Koofooship*) does not amount to a divorce (because a divorce takes place by the will expressed in words of the husband, but here the Kazee pronounces a declaration of the nullity of the marriage, but the Kazee has no authority to pronounce a divorce. Be it noted that it is of some importance to know whether this nullification amounts to a divorce or not, because if it amounts to a divorce, then in the event of the husband marrying the woman again, the husband would have in his hands only two instead of three divorces and it would affect inheritance).

Then if the marriage has been set aside (by the Kazee) before carnal intercourse and before *Khilwat-i-Suheeh*, then the husband shall be released from the whole of the dower, and the *Iddut* is not obligatory on the woman: but if the marriage has been set aside (by the Kazee) after *Khilwat-i-Suheeh*, then the husband is bound to pay the whole of the dower and the maintenance during the period of the *Iddut*. And if the Kazee does not set aside the marriage between the husband and the wife, then the marriage shall remain binding as regards all rights and obligations, such as the husband's authority to divorce, and to *Zihar* and *Eela*, and as to mutual inheritance.

1102. (202.) When a woman gives herself in marriage to one who is not her *Koofoo* (but who is lower in *Koofooship*), the guardians have the power to set aside the marriage as long as she is not delivered of a child by him (but if she gives birth to a child, then the guardians have no power): and the guardian's right (to annul the marriage for want of *Koofooship*) is not negatived (or lost) by reason of his silence after his knowledge, although the space of time might be considerable: but if the guardian takes possession of her dower and sends her to her husband, then his right is lost: (that is, if he both receives the dower and sends the wife to her husband, then all are agreed that his right to question the marriage is lost; but if he does the one and not the other, then there is a difference. See Fatawai Alumgiree, Volume I, p. 412): but if he does not take possession of the dower, but raises a dispute with the husband on account of balance of dower (saying that the dower should be increased, and the Fatawai Alumgiree adds two other conditions, *viz.*, if the guardian has been appointed Vakeel by the wife to raise the dispute with the husband, and if it has

already been proved before the Kazee that the husband is not the wife's *Koofoo*. See Fatawai Alumgiree Volume I, p. 412) and for maintenance, the guardian's authority shall be lost by analogy.

1103. (203.) When a woman gives herself in marriage to one who is not her *Koofoo* (but is below her), and one of the guardians consents to it (*e.g.*, if she has several brothers and of different kinds) it is not competent to him, or to a guardian equal or inferior to him in degree, to set aside the marriage : but the right shall appertain to a guardian superior to him.

1104. (204.) And if the guardian has given a woman in marriage to one who is not her *Koofoo,* and the husband has carnal intercourse with her; and the woman then gets separated from him by his divorcing her: and if the woman then gives herself in marriage to the same husband without the intervention of the guardian; then the guardian has authority to set aside the marriage. But if the divorce had been a reversible divorce (where the marriage still subsists), the guardian has no authority (to annul the second marriage). (The first marriage having been contracted by the guardian himself, he has no right to annul it: but the second marriage having been effected by the woman herself, although with the same husband, the guardian has no authority to annul it: in case of reversible divorce, the first marriage never came to an end and the second marriage counts for nothing, and the guardian has no authority to question the second marriage which was a mere formal one : this implies that the second marriage took place before the expiration of the *Iddut:* but if the second marriage was after the *Iddut,* then the first one having come to an end, the guardian would be entitled to annul it).

1105. (205.) A woman gives herself in marriage to one not her *Koofoo,* and the husband has sexual intercourse with her : then the Kazee sets aside (or annuls) the marriage between the husband and the wife by the hostility (or at the instance) of the guardian; then the (same) man marries the same woman before the expiration of the *Iddut* without the intervention of her guardian: the Kazee then (at the intervention of the guardian) separates the husband and wife before sexual intercourse : then according to Aboo Haneefa and Aboo Yusoof, on whom be peace, the husband shall be liable for the whole of the dower fixed at the second marriage and the future *Iddut* (*viz.,* the *Iddut,* owing to the second marriage being dissolved) shall be obligatory on her. (The first marriage having been followed by intercourse, the dower fixed in the first marriage is payable:

for the same reason, *Iddut* relating to the first marriage is obligatory on the woman. *Iddut* is the consequence of carnal intercourse; because if there is no carnal intercourse, there is no *Iddut* in case of separation or divorce; therefore when the second marriage takes place during the *Iddut* of the first marriage, then to all intents and purposes there is carnal intercourse following the second marriage, and therefore the whole of the dower fixed at the second marriage will be payable, and the woman will have to observe a second substantial and entire *Iddut* to be counted from the date of the separation; so that if the separation takes place before the completion of the *Iddut* obligatory by the first marriage, the second *Iddut* will commence at once, and for the common period of the two *Iddut*s there will be what is called *Tadakhool*, or *Merger*. The gist of the case is, that the second marriage is found before the expiry of the *Iddut* of the first marriage).

But Mahomed and Zoofur, on whom be peace, say, no dower (on account of the second marriage) will be due from the husband: and as regards the *Iddut*, Mahomed says, the remainder of the *Iddut* (due on account of the first marriage) is what should be observed by her, but Zoofur says, no *Iddut* is due at all (so that the remainder of the *Iddut*, if at all due on account of the first marriage, falls through; because Zoofur says the second marriage puts an end to the *Iddut*, as in the case of divorce when, before the expiry of the *Iddut*, the husband marries again which he is competent to do, the marriage puts an end to the *Iddut*: see paragraph 210.)

1106. (206.) And regard being had to this difference of opinion (as set forth above between Aboo Yusoof and Aboo Haneefa on the one hand and Mahomed and Zoofur on the other, and also between Mahomed on the one hand and Zoofur on the other), this matter divides itself into five cases. One of which is the case set forth above (*viz.*, as regards the dower relating to the second marriage, and the *Iddut* observable on account of separation after the second marriage, together with the different views as set forth in paragraph 205).

1107. (207.) And another (of those five cases) is this. A man divorces a woman with whom he has had carnal intercourse, the divorce being of a nature so as to make her *bain* or completely separate: he then marries her during the period (that is, before the expiry) of her *Iddut*, and divorces her before he has had carnal intercourse with her in this second marriage: then according to Aboo Yusoof and Aboo Haneefa (who taken

together are called the two Sheikhs) the husband is liable for the whole of the dower (fixed at the second marriage for reasons set forth within brackets in paragraph 205, which are supported by Shurah Vikaya, Volume II, p. 95, and another effect will be that a substantial *Iddut* on account of separation by divorce after the second marriage will have to be observed by the woman); whereas according to Zoofur and Mahomed, on whom be peace, half of the dower will be payable (according to the general rule by which a marriage, not followed by intercourse, involves liability to half of the dower only, and Mahomed and Zoofur not deeming mere marriage during *Iddut* as amounting to carnal intercourse by implication; also according to Mahomed there will be no *Iddut* on account of divorce after the second marriage, because there was no carnal intercourse in this second marriage, but there is nothing to prevent the completion of the *Iddut* on account of separation by reason of divorce in the first marriage: but Zoofur says, although there will be no second *Iddut*, still the first *Iddut* will come to an end by reason of the second marriage).

1108. (208.) Another (that is, the third) case is this:—A man divorces a woman, with whom he has had carnal intercourse, the divorce being of a nature so as to make her *bain* (or completely separate): he then marries her during the period of her *Iddut:* the woman then becomes—what God should prevent—a *Moortudda* (a term used to denote a person who becomes an infidel, having once been a Mahomedan and the Nikah then becomes *Fuskh* or avoided): and then she again accepts Islam: according to Aboo Haneefa and Aboo Yusoof, on whom be peace, the husband shall be liable for the whole of the dower (fixed at the second marriage): but according to Mahomed and Zoofur, on whom be peace, the husband is not liable to dower fixed at the second marriage: (according to the two Sheikhs, second marriage during *Iddut* is carnal intercourse by implication, giving rise to liability to dower: then by her forsaking the true religion, the marriage became annulled and the liability to dower for the second marriage dropped: then by her re-acceptance of Islam, although the marriage was not revived, still the right and liability to dower revived: but according to Mahomed and Zoofur re-acceptance of Islam does not revive the right to dower).

1109. (209.) And another (that is, the fourth case) of those cases is this:—A man marries a slave girl (belonging to another, because one cannot marry his own slave, she being already his property): he then, after

having had carnal intercourse with her, divorces her, so as to make her *bain* or completely separate : he then marries her during her *Iddut* : the woman is then emancipated (by the person whose property she was) and she in consequence exercises, before carnal intercourse in the second marriage, her option to cancel the marriage (which had been contracted by her master with the man under consideration : in this case also, according to the two Sheikhs the whole of the dower fixed at the second marriage becomes due, because marriage during *Iddut* is tantamount to carnal intercourse; but according to Mahomed and Zoofur, one-half of it will be due, there having been no carnal intercourse in the second marriage).

1110. (210.) And another (*i. e.*, the fifth and the last) of these cases is —Where a man after carnal intercourse divorces a woman so as to make her *bain* or completely separate ; he then marries her during the *Iddut* ; then separation is caused between them by reason of *lian* or by reason of the exercise of the option of puberty (on the part of the woman) : then, according to Aboo Haneefa and Aboo Yusoof, on whom be peace, carnal intercourse in the first marriage will be considered carnal intercourse in the second marriage, in regard to the perfection (or completion) of dower and to the obligation to observe *Iddut* : and according to Mahomed and Zoofur, on whom be peace, carnal intercourse in the first marriage will not be (tantamount to) carnal intercourse in the second marriage either as regards dower or as regards *Iddut* ; although according to Zoofur on whom be peace, the remainder of the *Iddut* (due after the separation from the first marriage) drops, but according to Mahomed, on whom be peace, it is not dropped.

1111. (211.) And if the first marriage is invalid (*Fasid*) and the husband has had carnal intercourse with the woman (in that marriage) or if the husband has intercourse with doubt in the marriage (*e.g.*, where instead of the bride, the husband has intercourse with a different woman, the husband being under the impression at the time that the woman is his wife, see Shurah Vekaya, Vol. II, p. 93) ; and (in consequence of such intercourse in either of the two cases) *Iddut* has become obligatory on the woman (on the separation in consequence of the invalidity of the marriage being established, or in consequence of the doubt being dispelled by knowledge of actual facts), the same rule holds good when the husband during that *Iddut* marries her by a valid marriage, but separates from her (by divorcing her) before having intercourse with her, (that is, the same consequences as set forth in the above paragraphs follow, *viz.*, according to the two

Sheikhs, the whole of the dower fixed at the second marriage will be payable, and a fresh *Iddut* shall have to be observed; whilst according to Mahomed and Zoofur half of such dower is payable; and as regards the *Iddut*, according to Mahomed no fresh *Iddut* is observable, but the woman shall finish the first *Iddut*, whilst, according to Zoofur, the first *Iddut* even shall cease).

1112. (212.) And if the marriage first contracted is valid, and the husband has intercourse (after this valid marriage), and separation takes place between the husband and the wife (by any of the reasons for which separation takes place, such as divorce, &c.), and the man then, during the *Iddut*, marries her by an invalid marriage, and then they are separated before carnal intercourse, then the dower fixed at the second marriage shall not be payable according to all (because the carnal intercourse of the first marriage counts for nothing in the second marriage, owing to the second marriage being invalid, and in an invalid marriage, without carnal intercourse, dower does not become obligatory).

1113. (213.) And if the second marriage takes place after the expiration of the *Iddut* (relating to the first marriage), and after the second marriage, separation takes place between the husband and the wife before carnal intercourse, then the result will be according to the rule laid down by Mahomed and Zoofur in the cases mentioned above (*viz.*, half of the dower will be payable and there will be no *Iddut*, because the carnal intercourse of the first marriage amounts to such by implication as regards the second marriage only when the second marriage takes place during the *Iddut* of the first marriage).

1114. (214.) A man marries a woman by representing that he belongs to a certain *Kubeela* (tribe or clan): but it appears afterwards that he belongs to a different *Kubeela* (tribe or clan); then if it appears that what was represented was inferior to what has come to light, but the husband is of her *Koofoo* notwithstanding what has come to light, as for instance, when the husband marries an Arab woman on the representation that he is also an Arab, but it appears afterwards that he is a Kooreishy (and a Kooreishy is superior to an Arab) or on the representation that he is an Ajumy (*i.e.*, not of her *Koofoo*), whereas he turns out to be an Arab (an Arab is superior to an Ajumy), then the marriage is binding (because the true facts shew that the husband is superior to what he had represented). And if what turns out is superior to what was represented (or in other

words, if what was represented was inferior to what has come to light) but the husband is not of her *Koofoo* (but on the contrary is inferior to her thus shewing that she had married knowingly one who was beneath her) as for instance when the husband marries a Kooreishy woman representing that he is Ajumy, but it appears afterwards that he is an Arab (an Ajumy is inferior to an Arab) then the marriage shall be binding as regards the woman (who shall not be entitled to set aside the marriage because she had knowingly married beneath her *Koofoo;* for what now turns out is superior to what was represented although still beneath her *Koofoo*) but the guardians shall have authority to object to the marriage.

But if what turns out is inferior to what was represented, and the husband is not of her *Koofoo* according to what turns out, as for instance, when a man marries an Arab woman by representing himself also to be an Arab, but it turns out that he is an Ajumy, then she shall be entitled to cancel the marriage; but if she is still agreeable to the marriage, then the guardians shall have the authority to set aside the marriage. And if what turns out is inferior to what was represented, but the husband is still of her *Koofoo*, as for instance, when the husband marries an Arab woman by representing himself to be a Kooreishy, but it turns out afterwards that he is an Arab, then she is entitled to set aside the marriage according to the three Sahibs (*i.e.*, Aboo Haneefa and his two disciples) but Zoofur disagrees with them (holding that she shall not be entitled to set aside the marriage, because the husband is still of her *Koofoo*, whereas the first three say she shall be so entitled, because she married on the supposition that her husband was superior to her).

1115. (215.) And in the same way if a man marries a woman saying that he is so and so, son of so and so, but it turns out that he (the husband) is the brother (instead of being the son) of that so and so by the father of that so and so (that is, it turns out that the husband is the brother by the same father, but by a different mother of his alleged father) or the paternal uncle of that so and so by the father of that so and so (that is, it turns out that the husband is the step paternal uncle of the alleged father), then the woman shall be entitled to set aside the marriage although the husband might be of her *Koofoo*.

1116. (216.) A man gives his minor daughter in marriage to a man who says he does not take intoxicating drinks, but the father finds him a habitual drinker: the minor then attains her puberty and says, "I do not agree to the marriage;" the lawyer Aboo Jaffer on whom be peace, says,

if the father of the girl does not (himself) take *intoxicating drinks*, and if the majority of his household are pious, then the marriage is void (*batil*); because the father of the minor did not agree to the marriage in consequence of the absence of *Koofooship*, and he did not give her in marriage but on the supposition that he is her *Koofoo*: (the marriage contracted by the father is ordinarily binding, and the woman has, in that case, ordinarily no option of puberty; but in this case she has).

1117. (217.) And it is said in the Asul that if a woman gives herself in marriage to a man without knowing whether he is a free man or a slave, but it appears afterwards that he is a slave, who has obtained permission to marry, she shall have no option (to cancel the marriage), but the guardians shall have the option: and if the guardians give her in marriage, with her permission without their knowing whether the man is free or a slave, but they come to know afterwards that he is a slave, neither of them (*i.e.*, neither the guardian nor the woman herself) has the option (to cancel the marriage).

1118. (218.) And likewise if the husband says he is a free man and the guardians (on the faith of the representation) give the woman in marriage to him, but it appears afterwards that he is a slave, then the guardians shall have the option (to cancel the marriage).

1119. (219.) And it follows from the rules set forth above, (see paragraphs 217 and 218) that if a woman gives herself in marriage to a man without there being a stipulation of *Koofooship*, whether the woman knows that the husband is her *Koofoo* or knows that he is not her *Koofoo*, and then it appears that he is not her *Koofoo*, she shall have no option to cancel the marriage: and also if the guardians give the woman in marriage with her consent without their knowing that he is not her *Koofoo*, but they afterwards came to know of it, (they shall have no option to cancel the marriage): but if the *Koofooship* has been made a condition of or if the guardians have received information that he is her *Koofoo*, and they then give her in marriage, but it appears afterwards that he is not her *Koofoo*, they shall have the option: (see paragraph 214; in case of stipulation and in case of information, the guardians contract the marriage on the understanding that the husband is the *Koofoo* of the wife, but in the other case they give her in marriage disregarding the circumstance of *Koofooship*.)

1120. (220.) And if a drunkard gives his minor daughter in mar-

riage for a dower less than her Meher-i-Misl (or proper dower), then Sheikh-i-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, if the father does so after the intoxication has subsided (and he is in his senses) then the marriage is valid according to Aboo Haneefa on whom be peace, but it is not valid according to his two Sahibs (or disciples, Aboo Yusoof and Mahomed) on whom be peace : but if the drunkard (in a state of intoxication) is not in a fit state of mind and judgment, the marriage contracted by him (in such a state) shall not be operative (or effectual) as regards a female minor (who is his daughter) for a dower less than her Meher-i-Misl (or proper dower).

1121. (221.) And if a drunkard, after the intoxication has subsided (and he has recovered his senses) gives his minor daughter in marriage to a man who is not of the same *Koofoo*, then the marriage shall not be valid according to the two disciples, and there is a difference of opinion regarding the view which Aboo Haneefa took in this matter ; but apparently Aboo Haneefa held that the marriage is valid. But if the drunkard gives her in marriage (whilst in a state of intoxication) to a man who is not of the same *Koofoo*, then the marriage is not valid according to all (three, *i.e.*, Aboo Haneefa and his two disciples).

1122. (222.) And traditions have differed regarding what the two Sahibs (Mahomed and Yusoof) have held when the father and grandfather give a female minor in marriage (that is, when either of them gives her in marriage) for a dower less than her Meher-i-Misl (or proper dower). According to one tradition from them (that is, according to one tradition they hold that) the marriage is invalid (*fasid*) ; according to another tradition, the marriage is (according to them) dependent on her ratification after attaining her puberty. And it is (also) reported of Aboo Yusoof, on whom be peace, that he said that the dower fixed (which is less than the wife's proper dower) shall be invalid, but the marriage shall be valid for her Meher-i-Misl (or proper dower).

1123. (223.) A woman gives herself in marriage to a man who is not her *Koofoo ;* the guardian shall be entitled to refer the matter to the Kazee for him to cancel the marriage, although the guardian might not be (of the class called) her guardian by relationship within the prohibited degree, (Za Ruhum Mohurrum), such for instance as the son of the paternal uncle, and so forth : (and if he is of that class then he would be so entitled). And it is said that a guardian who is not related to a woman

within the prohibited degree, is not entitled to make the objection. But what is mentioned first is correct.

1124. (224.) When a female minor is given in marriage by a guardian different from her father or grandfather to a man whose grandfather had been emancipated by one of a tribe (*i.e.*, by his master who belonged to a tribe) or whose grand-father was not originally a Moslem having himself alone (and not his ancestors) become a Moslem, whereas the female minor's ancestors have always been free Moslems; and the minor girl then attains her puberty and ratifies the marriage, the marriage shall not be valid; because the marriage, at the time it took place, had nobody who could allow it (that is, the marriage was not contracted through the instrumentality of one who had authority to validate such marriage, the female herself having been a minor and the guardian was not the father or the grandfather and the husband was not of the same *Koofoo*) : the marriage, therefore, was not dependent, and ratification does not appertain to it. (No guardian except the father and grandfather can give a minor girl in marriage to one not of her *Koofoo*).

1125. (225.) And so also if the absence of *Koofooship* arises for a different reason (that is, different from that mentioned in the above paragraph) the marriage contracted by a guardian different from the father or grand-father shall not be effected.

1126. (226.) A woman gives herself in marriage to a man not her *Koofoo :* the learned have held that she can refuse herself to the husband and prevent him from having intercourse with her, until her guardian shall consent to this marriage; because to all appearance the guardian will not consent (to a marriage beneath her *Koofoo*) : therefore, if the husband were to have intercourse with her, she might become pregnant, in which event the marriage will not be liable to be cancelled and the guardians will feel disgraced by reason of the alliance with one who is not their *Koofoo.*

God knows best.

SECTION VIII.

ON GUARDIANS.

1127. (227.) The text which forms the basis of the authority of a guardian (in the matter of marriages) is the saying of the Prophet, on whom be praise of God and mercy.—"There is no *Nikah* except by (means of) a guardian." And the existence of a guardian is a condition for

the validity of the marriage of minors, and of those who are the property of others, (*i.e.*, those who are slaves), and of those who are insane.

1128. (228.) Guardianship arises from different causes (that is, the authority of a guardian arises from several causes, those causes being four in number: *viz.*, Milkool Yameen, Karabut, Wila, and Imamut, (see Vol. II, Ruddool Moohtar, p. 484): the strongest of those causes is the right of ownership (Milkool Yameen). So that the marriage of those who are the property of others is not valid except with the permission of the owner: and the owner has the right to compel his male slave to marry (*i.e.*, to give him in marriage without his consent) according to us (the Hanifites, a different view having been taken by the Shafye), and the right to compel his female slave to marry according to all. (See paragraph 140 *ante*). And those who are the common property of two men, cannot be given in marriage by either of them.

1129. (229.) Next to the right of ownership comes the right (of guardianship) by being a residuary according to the saying of the Prophet. "The authority to give in marriage is in the residuary" (that is, the residuary has the right to give in marriage). And the nearest residuary (guardian) for (the marriage of) a male or female minor is the father; next to him is the grandfather, that is the father's father, and so on (in the) ascending (line).

1130. (230.) And the son belongs to the (class of) residuary (guardian) having authority to give his insane mother in marriage according to us, (*i.e.*, the Hanifites). And Shafye, on whom be peace, says, that the son has no authority to give his mother in marriage unless the son is her *Asheera*, (*i.e.*, of the same family or tribe as the mother, *e.g.*, where the marriage is between cousins there the son is the *Asheera* of the mother).

1131. (231.) And there is a difference of opinion amongst our *Ashabs* (*i.e.*, Aboo Haneefa, Yusoof, and Mahomed) as regards the authority of the father and son in regard to (the marriage of) an insane woman, when both are to be found (that is, when both are in existence, the difference being which of them has the preferential right of guardianship). Aboo Haneefa and Aboo Yusoof, on whom be peace, have said that the son has the stronger right to give her in marriage, whereas Mahomed, on whom be peace, has said that the father has stronger right, because he (the father) is entitled to dispose of (*Tusurroof*) her property and person whilst the son has no authority to dispose of (*Tusurroof*) her property.

1132. (232.) And in the same way (as the son, see paragraph 230),

the son of a son, how low soever (is guardian in regard to the marriage of an insane woman).

1133. (233.) Next is the brother by the same father and mother: then the brother by the same father only, then their sons, according to the same order (*i.e.*, first full blood and then half blood), howsoever low, (have authority in the marriage of a minor or insane female).

1134. (234.) Then the paternal uncle by the same father and mother, (*i.e.*, full brother of father), then the paternal uncle by the same father only (*i.e.*, father's half brother), then their sons (how low soever) according to the same order (*i.e.*, full blood having preference).

1135. (235.) Then the paternal uncle of the father by the same father and mother, then the paternal uncle of the father by the same father only, then their sons according to the same order.

1136. (236.) And the whole of what has been stated above is according to the view of our *Ashabs* (*i.e.*, Aboo Haneefa, Yusoof, and Mahomed) on whom be peace. Shafye, on whom be peace, has said that one who is not a father or grandfather is not entitled to give a female or male minor in marriage (that is, except the father and grandfather nobody has the right of guardianship in marriage).

1137. (237.) And a guardian is entitled to give a Syaeba (that is, a woman who has already been married before) who is a minor, in marriage (that is, by compulsion without her consent), according to us (*i.e.*, Aboo Haneefa, Yusoof, and Mahomed), although Shafye has differed from this view.

1138. (238.) And out of those who are related after the residuaries, the guardianship according to us (*i.e.*, Aboo Haneefa, Yusoof, and Mahomed), appertains to the master, who has bestowed freedom; because he (such master) is a residuary: then come the residuaries (by relationship) of the master who has bestowed freedom.

1139. (239.) And in default of the residuaries, each of the relations, who is the heir of the female or male minor, and who belongs to the distant kindred (*Zawil Arham*) is entitled to give the female or male minor in marriage according to the Zahir-i-Rawayet from Aboo Haneefa, on whom be peace.

And Mahomed, on whom be peace, says there is no (right to) guardianship (for the purposes of giving a minor in marriage) in the distant

kindred. And the view of Aboo Yusoof, on whom be peace, is conflictingly reported.

1140. (240.) And the nearest (amongst the distant kindred, or *Zawil Arham*) according to Aboo Haneefa, is the mother, then the daughter; then the son's daughter; then daughter's daughter; then son's son's daughter; then daughter's daughter's daughter; then sister by the same father and mother; then the sister by the same father; then brother and sister by the same mother; then their children (*aulad*); then paternal aunts (*i.e.*, father's sisters) and maternal uncles (*i.e.*, mother's brothers) and maternal aunts (*i.e.*, mother's sisters) and their children (*i.e.*, *aulad* of father's sister and mother's brother and mother's sister) according to this order (that is, the order to be observed as regards the father's sister is, that full blood is to be preferred to half blood, and those on the father's side are to be preferred to those on the mother's side as aforesaid, and so also as regards mother's brother and mother's sister).

1141. (241.) Then if there be found together the false grandfather (*i.e.*, mother's father) and the sister, then, according to Aboo Haneefa, on whom be peace, the guardianship belongs to the grandfather (that is, mother's father is also a guardian, and he is to be preferred to the sister).

1142. (242.) And after these (*i.e.*, after the *Zawil Arham*), is the Mowla-i-Mowalat (or master by reason of friendship in regard to father of the minor, and as to this class, see Ruddool Moohtar, Vol. II, p. 513), according to Aboo Haneefa, on whom be peace, but his two disciples have differed from him (they having held that the father's master by reason of friendship or the Mowla-i-Mowalat is no guardian).

1143. (243.) And as long as there is a guardian by relationship to the minor, the Kazee is not the guardian according to Aboo Haneefa, on whom be peace (that is, it is only in default of the residuaries, or *Asbat*, and the *Zawil Arham* that the Kazee can be guardian), and according to his two disciples, as long as there is a residuary to the minor, the Kazee is not the guardian: (that is, the Kazee comes after the residuaries, and the *Zawil Arham* have no right of guardianship).

1144. (244.) Then the authority of the Kazee to give in marriage one who stands in need of a guardian arises only when he is vested with such authority by his appointment by the *Munshoor* (or Firman of the King); but if he is not vested with such authority by his appointment and Firman, then the Kazee shall not have authority to act as guardian in marriage.

So if the Kazee gives her in marriage when the Sultan has not given him authority for this (*i.e.*, to give in marriage), and the Sultan afterwards gives him such authority, and the Kazee then (again) validates this marriage (or ratifies it) the marriage will be valid by analogy (or Istihsan); as in the case of a slave, when he marries without the permission of his master, and the master afterwards gives the slave permission to marry and the slave then adopts (or validates and ratifies) this marriage, the marriage is valid by analogy.

1145. (245.) And the executor has no authority in the marriage of a male or female (that is, he has no authority to give the minor in marriage), whether the father has, by his will, given him authority or not. And Hashem reports from Aboo Haneefa—and this is the view taken by Malik,—that if the father has by his will given his executor authority, then the executor is competent to give the male or female minor in marriage. And Ibn-i-Aboo Laila has held that the executor is guardian having authority to give in marriage in both cases (whether the will contains an express authority or not).

1146. (246.) And if a male or a female minor is in the custody of a man (literally, who is in the lap of a man) and is being brought up by him, he having picked him or her up, or being in such like manner in charge of him or her, then he has no authority to give him or her in marriage.

1147. (247.) And there is no guardianship (for marriage) in a child (*Sabeeya*), or an insane man, or one who is the property of another (that is, these cannot act as such guardian of a minor whether the minor is a Moslem or an infidel): neither has the unbeliever, (the *Kafir*), authority (of guardianship for marriage) over a Moslem.

1148. (248.) And wickedness, (*Fisk*), is no disqualification in the matter of guardianship.

1149. (249.) And if to a male or female minor there are two (or more) guardians (in the same degree), such as, two brothers or two paternal uncles, then whoever gives in marriage, the marriage shall be valid according to us (*i.e.*, Aboo Haneefa, Mahomed and Yusoof). And if both of them, one after the other, gives in marriage, then the first marriage will be valid and not the second (that is, if a female minor is so given in marriage; because if a male minor is given in marriage by both the guardians in succession, both the marriages will be valid). And if each of the two

guardians gives her (a female minor) in marriage to a different man, then if both the marriages have taken place at the same time (that is, if the two marriages, although they were contracted at different places, were contracted at the same hour), or if it cannot be ascertained which of them is prior in point of time, both the marriages shall be made void (*batil*).

And Malik, on whom be peace, says, that one of the two guardians shall not act separately in giving in marriage (that is, both of them shall join and act together) : just as if there are two masters (of a slave), they cannot act separately in giving in marriage the male slave or the female slave, who has received freedom.

1150. (250.) And if a remote guardian has given her (a female minor) in marriage whilst a nearer guardian is present (that is, is not absent as subsequently set forth), the marriage shall depend on the permission of the nearer guardian : but, if the nearer guardian is absent—the absence being of a nature so as to cut off communication (*Ghybut-un-Moonkutaiatun*), then the marriage given by the remote guardian shall be valid according to us.

And Shafei, on whom be peace, says, when the nearer guardian is absent (*Ghybut-un-Moonkutaiatun*), then the guardianship shall be transferred to the Sultan or the Kazee. And Zoofar, on whom be peace, says, nobody shall give her (a female minor) in marriage until the nearer guardian appears, or the Vakeel of the nearer guardian gives her in marriage, [that is, if the nearer guardian is absent (*Ghybut-un-Moonkutaiatun*) then nobody has authority, and the girl shall not be given in marriage until his return : but the Vakeel of the nearer guardian, who sends the Vakeel with authority to give the girl in marriage shall have such authority].

Then if the nearer guardian (who is so absent) gives her in marriage from the place where he is, then the learned have differed as regards the validity of the marriage so contracted by him : but it is obvious that the marriage shall be valid.

1151. (251.) And there is a discussion (amongst the learned Doctors) as to what constitutes absence of a nature to cut off communication (*Ghybut-i-Moonkutya*). Some of the learned have held that the measure of it is that communication (by means of message) is cut off and *Kafila* (or party of travellers) cannot reach : and some of them have measured it by a distance of one year's journey, and some of them have measured it by a distance of one month's journey. But the majority of the learned have

held that if he (the guardian) is at a place, so that the (minor girl's) *Koofoo*, (that is, the bridegroom who is of the same *Koofoo* who intends to marry the girl. See Shuruh Vikaya, Vol. II, p. 20), cannot (afford to) wait for the intelligence reaching from the guardian, then this absence is (what is technically called) absence of a nature to cut off communication.

And in the work (of Mahomed) it is pointed out that the lowest period of time, which constitutes (what is technically called) journey (which is three days) is sufficient to constitute such absence, and this is the view taken by Mahomed, son of Mookatil, inhabitant of Rye, on whom be peace, and by Soofyan, inhabitant of Sowr, and by Aboo Ismat and by Syad, son of Maaz, inhabitant of Merv, on whom be peace, and upon that is the *futwa* given by a larger body (*Jamaut*) of modern lawyers. One of those modern lawyers is Kazee Imam Aboo Ally, of Nusuf, on whom be peace, who says, from Bokhara to Nusuf is (the distance which constitutes), absence (technically) of a nature to cut off communication.

Therefore, if the nearer guardian, wherever he may happen to be, is moving about (not having for instance a fixed shop or place where he could always or at stated intervals be found) so that his address (or sign) could not be found, or if all intelligence of him is lost, (*Mufkood*) so that the place of his residence cannot be discovered; or if he (although residing in the same town where the female minor lives) be concealing himself in the town, so that he cannot be traced out, then Kazee Imam Abool Hussun Ally, of Soogd, on whom be peace, says, that he, the guardian, is, to all intents and purposes, absent, so that his absence is of a nature to cut off communication; because, when it became impossible to get at him (or to reach him) and get the benefit of his opinion (or advice), then he shall be considered dead to all intents and purposes.

Then if a more remote guardian has given her in marriage, and it is afterwards found out that the nearer guardian was concealing himself in the town, the marriage contracted by the more remote guardian shall be valid.

1152. (252.) And if a man gives his son (who is a minor) in marriage to a woman for more than her proper dower (thus causing loss to his minor son); or if he gives his minor daughter in marriage for less than her proper dower; or gives her in marriage to one of a different *Koofoo;* or if he gives his minor son in marriage to a female slave, or to a woman who is not her *Koofoo*, this marriage is valid according to Aboo Haneefa, (thus illustrating the rule that the father has full authority in the marriage of

his children provided he acts *bonâ fide*). But his two *sahibs* (or disciples) have held that this marriage is not valid.

1153. (253.) And the lawyers are agreed in this view that such marriage as has been set forth (in the) above (paragraph) is not valid, if contracted by a guardian except the father and grandfather (that is, in the case of the father and grandfather there is a difference, but in the case of other than the father and the grandfather, there is no difference of opinion) : nor by the Kazee (that is, the learned have agreed that the Kazee cannot give the minor in such marriage as is set out in paragraph 252).

1154. (254.) When the male or female minor attains majority, then, if they had been given in marriage by the father or grandfather, they (that is, he or she has) have no option (to cancel the marriage) : and they have the option of puberty, if they have been given in marriage by a guardian different from (or other than) the father or grandfather, according to Aboo Haneefa and Mahomed, on whom be peace, but Aboo Yusoof, on whom be peace, says, they have no option.

1155. (255.) And when she (the female minor) attains puberty, having been a virgin (or *Bakira, i.e.*, unmarried at the time she was given in marriage), and keeps quiet for a second (*Saaut*), her option shall become void, (*batil*) : then if she cancels the marriage as soon as she attains puberty, and calls witnesses to this (cancellation), the same, (cancellation by her) shall be valid. But in the case of a boy or in the case of a girl, who is a *Syeeba* (who had already been married once), their option of puberty shall not become void, (*batil*) by their silence, and their option shall not be coupled with the condition that the option shall be exercised at the same meeting, (*mujlis* of attaining puberty), and she (the Syeeba girl) shall (still) have her right of option until she makes a declaration of her consent, or does an act which denotes consent, such, for example, as giving the husband an opportunity to have carnal intercourse with her, or asking for her maintenance (in which cases she denotes her consent and forfeits her option), but if she eats of the food of her husband, or if she does his work as she used to do, she shall (still) have her right of option (that is, she shall not forfeit it).

1156. (256.) The option of puberty differs from the option of freedom in various particulars : one of them is, that freedom of puberty becomes void (*batil*) by standing up from the meeting (when, with the know-

ledge that she has the right of option, the woman, who had been given in marriage whilst a slave, instead of declaring, on hearing that she has got her freedom, that she has avoided the marriage, stands up), but the option of puberty, in the case of a boy or a Syeeba woman (*i.e.*, one who had already been previously married) is not rendered void by standing up from the meeting.

1157. (257.) And secondly, ignorance of (what constitutes) option of puberty is not regarded as an excuse (because every Moslem is bound to get acquainted with the rules of law) so that a female minor (who has attained puberty and who is a virgin), when she says, "I did not know of the option of puberty and my silence did not arise, but on that account (*i.e.*, on account of ignorance)," shall not be regarded as exempted; and her option shall become void, (*batil*): whereas a female slave, who has obtained her freedom, when she says so, shall be excused, (or exempted), and her option shall not become void, (because having been engaged in the work of her master, her excuse, which is really based on want of time to learn the rules of law, is admissible); although she might say so after a time.

1158. (258.) Another difference is, that option of freedom is the right of a female slave and not that of a male slave; whereas option of puberty is the right of both of them (*i.e.*, both of the boy and of the girl after they shall have attained the age of puberty).

1159. (259.) Another difference is, that the option of freedom is not rendered void (*batil*), by silence, although she might be a virgin (that is, when she knows she has the option and still keeps quiet), whereas option of puberty is rendered void (*batil*), by silence of the virgin (*Bakira*).

1160. (260.) Another difference is, that in the case of option of freedom, separation does not depend on the (order of the) Kazee, but, on the contrary, the separation is established by her own authority; whereas in the case of option of puberty, separation shall not take place, and the marriage shall not become void (*batil*) until the Kazee shall set aside the marriage between them.

1161. (261.) Then if the separation takes place (on account of option of puberty by order of the Kazee, or on account of option of freedom by the exercise of the woman's will given expression to) before carnal intercourse, then the whole of the dower drops (that is, the right to it is forfeited and it is at an end), whether such separation takes place on the part of the man

(that is, when the minor boy, attaining majority, exercises his option of puberty, and the Kazee directs a separation); or on the part of the woman (on account of the exercise of option of puberty or liberty): but if the separation takes place after carnal intercourse, no part of the dower shall drop (or cease to be obligatory).

1162. (262.) A male and a female minor have the option of puberty, if the Kazee has given them in marriage, according to the more approved (or accepted and received) of two traditions from Aboo Haneefa, on whom be peace, and that also is the view of Mahomed, on whom be peace.

1163. (263.) And if the father gives his minor daughter in marriage, and stands surety to her for the dower on behalf of the husband (that is, saying, "if the husband will not pay I will pay,") his suretyship is valid: then, if, on attaining majority, she demands payment from her father on account of the latter having stood surety, then the father shall not be entitled to look to the husband (for satisfaction, and ask to be indemnified by him) if the suretyship (by the father) had been without his (the husband's) direction; but the father shall be entitled to look to the husband (that is, make him liable) if the suretyship had been with the husband's permission. Then, if the father had stood surety at a time when he was in *Murzool-Mout* (labouring under a mortal disease), his suretyship is not valid.

1164. (264.) And if the father gives his minor son in marriage to a woman, and stands surety on behalf of the minor son for dower, then, if the father is in health (at the time he stands surety), this suretyship is valid; and if the woman realises the dower from the father, then, according to *Kyas* (or reasoning from analogy), the father shall be entitled to look to the property of the minor (for satisfaction); but according to *Istihsan* (weak analogy), the father shall not be entitled to do so: and if the father dies, and the woman realises the dower from his estate (or inheritance), then all the (remaining) heirs are entitled to look to the share of the minor (which he has obtained by inheritance), according to us; but Zoofur differs in this respect (holding), that the heirs shall not be entitled to make the minor's share contribute to them). And if the son is of age (at the time of marriage) and the father when in health stands surety for him without the son's direction, and the father then dies, and compensation is taken from the assets (or inheritance) left by him, the (remaining) heirs shall not be entitled to look to the share of the son (to make up what is taken away

from them), according to everybody, (that is, without a difference of opinion).

And if the father, when in *Murzool-Mout* (labouring under a mortal disease) stands surety for the dower on behalf of his minor son, then his suretyship shall not be valid.

And those who are insane are like minors in this matter (that is, in regard to the father standing surety for dower).

And when the father stands surety on behalf of his minor son and pays the dower, he shall be deemed as having done an act of kindness; but when he calls witnesses at the time of making the payment (to the effect), that "he makes the payment in order that he might (or with the intention that he shall) recover it," then, in that case, he shall not be deemed as having done a mere act of kindness.

1165. (265.) And the father has no right to give his virgin adult daughter in marriage, in spite of her (that is, without her consent), but Shafei, on whom be peace, has differed from this view (holding that the father has the right of compulsion); but in the case of a Syeeba (a woman of age, who has already been married) the father cannot give her so in marriage, without any difference (on the part of Shafei).

1166. (266.) And if the father of his adult daughter, she being in a sound state of mind, (*akila*, as contradistinguished from *Mujnoona* or insane) and a virgin (*Bakira*), the father being an infidel (*Kafir*) or a slave, and she expresses in words her consent to the marriage, the marriage shall be held valid according to Aboo Haneefa and Aboo Yusoof, on whom be peace, and Mahomed, on whom be peace, says, that the marriage is not valid (because the father is an infidel or slave); but if (instead of expressing her consent in words) she keeps quiet, then the marriage shall not be valid, without any difference of opinion.

1167. (267.) And if the son attains majority in a state of idiocy or insanity, the guardianship of the father shall continue (and subsist) over the property and person of the son.

1168. (268.) But if he (the son) attains majority in a sound state of mind, and then becomes insane or an idiot (that is, and afterwards insanity or idiocy is superinduced) whether the guardianship of the father in the son's property and person will revert to the father is a question in which there is a difference of opinion.

Aboo Baker of Balkh, on whom be peace, says, the guardianship of the father (in the son's property and person in such a case) will not revert to him according to Aboo Yusoof, on whom be peace; but (on the other hand) the guardianship shall appertain to the King (or Sooltan).

And Mahomed, on whom be peace, says, the guardianship shall (in such a case) revert to the father in the property and person of the son by analogy (*Istihsan*).

And Mahomed, son of Ibrahim of Maidan, on whom be peace, says, that "according to us (that is, according to Aboo Haneefa, Aboo Yusoof, and Mahomed) the guardianship will revert to the father, but according to Zoofur, on whom be peace, the guardianship is established in the Sooltan."

1169. (269.) But if the father becomes insane or an idiot, whether the guardianship shall appertain to his son for the purpose of dealing (*Tussuroof*), with the property and person of the father, is a matter in which there is a difference similar to that in the case of a son who becomes insane, (that is, according to some, the son will be guardian, and according to others he will not, but the Sooltan will be the guardian).

1170. (270.) A woman comes to the Kazee, and says, "Verily do I intend to marry, but I have no guardian, and nobody knows me," (so that she is unable to produce witnesses to prove that she has no husband living): it is valid (or permissible) that the Kazee should give her permission to marry, and should say to her, "I have given thee permission, if thou art not a Kooreishy, and not an Arab woman (assuming that she is going to marry one not a Kooreishy, or one not an Arab), and not the property of somebody else, and hast not a husband, and art not observing the *Iddut* with reference to a man."

And, similarly, if she has a guardian who refuses to give her in marriage, it is competent to the Kazee to give her permission to marry.

And if she has no guardian, and she intends to be on the safe side, she must refer to the Kazee, so that the Kazee might (himself) give her in marriage with her consent, or give her permission to marry: but if deeming it indelicate (or abhorrent) to refer to the Kazee, she makes a demand on her father to give her in marriage, and the father says to her, "Verily did he (the father) give her in marriage when she was a minor to a man who is absent" (and she consequently brings the matter before the Kazee) and the father cites witnesses (*byyuna*) to prove what he has said: then the learned Doctors have held that no heed shall be paid to the proof

(*byyuna*) ; because the proof is directed towards one who is absent, and on whose behalf there is nobody present to oppose (the father).

1171. (271.) And the father is competent to give her (*i.e.*, his adult daughter) in marriage : but if the father refuses to do so, she shall refer the matter to the Kazee, so that the Kazee might give her in marriage; or she might herself contract a marriage : and it is said that it is much better for her to do so (that is, to marry herself without the intervention of a guardian or without referring to the Kazee) than to refrain from marriage; because Mahomed, on whom be peace (resiling from his former view, that by *Ibarut-i-Nisa*, or the words of a woman, no *Nikah* is valid), adopted the view of Aboo Haneefa, on whom be peace, in the matter of marriage without a guardian (that is, that an adult woman is free to marry herself without the intervention of a guardian).

1172. (272.) If a guardian other than the father and grandfather, gives a female minor in marriage, the learned have held that it is more safe that the guardian should give her in marriage (to the same husband) twice, once for the dower fixed, and a second time, without making mention of any dower (and this course should be adopted) for two reasons, one of which is that, if in the dower named (*i.e.*, in the dower which is fixed at the time of the first marriage), there is a clear (or gross) deficiency (that is, if the dower fixed should happen to be less than her proper dower), and (consequently) the marriage is not valid on account of this deficiency, the marriage shall be valid for the proper dower (because no dower having been named at the marriage performed a second time, what is payable is the proper dower); and secondly, if the husband had made a vow (or taken an oath, or *Huluf*) for the divorce of the woman whom he might marry (that is, if the oath had been expressed) in the following words, "If I shall marry a woman, then she shall be divorced," or in the following words, "Every woman whom I shall marry, shall be divorced:" then, when he marries the woman (for the first time), his oath becomes fulfilled by the marriage being gone through first, and divorce is caused upon her; but the woman shall become lawful to the man by the marriage performed the second time. (But if the husband had sworn in the words, "Whenever or on whatever occasions, *Koolluma*, I shall marry," then there will be divorce by the marriage on the second occasion also).

And if the man who gives her in marriage, (that is, if the guardian who gives the female minor in marriage) is the father or the grandfather, it is proper for him, likewise, that he should effect the marriage in this way

twice, according to Aboo Yusoof and Mahomed, on whom be peace, for those very two reasons which have been mentioned; because, according to them, (even) the father and the grandfather have no authority to give in marriage for less than the *Meher-i-Misl* (or proper dower), so as to cause a gross deficiency (or loss of dower), just as, according to everybody (all three, *i.e.*, Aboo Haneefa, Yusoof, and Mahomed), a guardian, other than the father and grandfather, is not so entitled. But, according to Aboo Haneefa, the father and grandfather are authorised to give in marriage for less than the *Meher-i-Misl* (or proper dower), and therefore (although according to him the marriage for the dower fixed is not open to the first objection, still) they (the father and grandfather) should contract the marriage in the way set forth above (that is, should contract the marriage twice) for the second reason (mentioned above, *viz.*, the vow of the husband regarding divorce).

And it is necessary that the marriage performed a second time should be for a dower not stated, because if the dower were to be mentioned (or fixed and named) in the second marriage, she shall be entitled to two dowers, and some of the lawyers have held that even if a man repeats the marriage with one with whom he has already performed the marriage (that is, if a man having once married a woman, goes through the form of marriage a second time, out of fancy, or other reason), even then she is entitled to two dowers: and it often happens that the woman brings this matter before the Kazee for the purpose of his decision, when the Kazee, who, if he holds the opinion that two dowers ought to be awarded, will award two dowers.

1173. (273.) If the guardian is totally insane (*Janoon-i-Mootbik*, that is, without having lucid intervals), his guardianship shall cease, and if he is insane, with lucid intervals, his acts, as regards his (own) person and property, done in a state of insanity shall be without operation, (much less shall they be operative and held valid as regards the ward), but his acts shall be operative if done during lucid intervals.

1174. (274.) And what is total insanity (*Janoon-i-Mootbik*) is a question in which there is discussion: Aboo Yusoof, on whom be peace, says, that perfect insanity is measured by (its existence during) the greater portion of the year; and Mahomed, on whom be peace, says, that in the matter of fast the same is measured by one month, and in the matter of Zukat it is measured by one year; and it is reported of Aboo Yusoof, on whom be peace, that he changed his view in favor of the view of Mahomed, on whom be peace.

CHAPTER II.

SECTION I.

ON WOMEN WITH WHOM MARRIAGE IS PROHIBITED.

1175. (275.) Prohibition of marriage is of two kinds: One is permanent (or perpetual) prohibition, and the other is not permanent prohibition (that is to say, temporary prohibition).

1176. (276.) Permanent (or perpetual) prohibition is established by *Nusub* (or consanguinity), and *Reza* (or fosterage), and by *Suhreeut* (connection by carnal intercourse, whether legal or not).

1177. (277.) The women who are prohibited by consanguinity (or *Nusub*) are those who are specified (*Nussa*) by God, when he says, "The following are prohibited to you, your mothers," to the end of the text (*Ayit*). (See paragraph **119.**)

1178. (278.) The mother is prohibited to her son, whether the son be a bastard and illegitimate, or legitimate (*i.e.*, whether he is born of legal intercourse or not).

And so also the grandmother, near or remote, whether she is through the father or the mother (*i.e.*, a paternal or maternal grandmother, how high soever is prohibited).

And so also the daughter and her children (*i.e.*, her daughters), how low soever: and so son's daughter likewise (how low soever).

And the female produced of water from whoredom (*i.e.*, a daughter born of whoredom or concubinage), is prohibited according to us (*i.e.*, Aboo Haneefa and his disciples; not according to Shafei).

And so also the sisters from whatever side they might be (*i.e.*, full sister, or half sister, or step sister): and sister's daughters how low soever (*i.e.*, daughters of sisters of all the three kinds, and the daughter's daughters of such sisters how low soever, and the son's daughters of such sisters, how low so ever).

And so also brother's daughters, how low soever (*i.e.*, daughters of brothers of all the three kinds, how low soever, and daughter's daughters of such brothers, and son's daughters of such brothers, how low soever).

And so paternal and maternal aunts of any of the three kinds (*i.e.*, father's or mother's full sisters, or half sisters or step sisters). And the paternal and maternal aunts of the (roots) ancestors in the male or female line (that is, father's sister of all the three kinds, or such sisters of father's, father's father, how high soever: and father's mother's sisters, or father's father's mother's sisters; and mother's father's sisters, and mother's mother's father's sister; and mother's mother's sister, or mother's mother's mother's sisters, of all three kinds); mother of paternal aunt is prohibited, (that is, father's sister's mother is prohibited; such mother is either the man's own grandmother, or is the married wife of his grandfather).

Paternal aunt's paternal aunt, by the same father and mother, or by the same father only, is similarly prohibited (that is, father's full sister's or half sister's paternal aunt, or *phoophy*); but paternal aunt's paternal aunt, or *phoophy*, by the same mother only, is not prohibited (that is, father's full sister's step sister is not prohibited).

1179. (279.) Now, as to those (women) prohibited by reason of fosterage. Those (women), who are prohibited by reason of *nusub* (or consanguinity), are prohibited by reason of fosterage (*i.e.*, to the child who has sucked the milk of a woman, all those are prohibited who would be prohibited if the child had been her son). And there is no difference between fosterage and descent (as regards prohibition to marry), except in respect of a few cases (*Masail*).

One of those cases is that to a man is prohibited his child's sister by *nusub* (the child's sister, if of the whole blood, is the man's daughter; if the sister is by the same father only, but by different mothers, even then she is the man's own daughter: if the sister is by the same mother but by different fathers, then the child's sister is the man's *Mowtooa's* daughter, that is, the daughter of one with whom he has had sexual intercourse), but there is no prohibition in regard to the sister of the child by fosterage (that is to say, there is no prohibition in the following cases, *viz.*, a man's child's foster sister; a man's foster child's sister by descent or *nusub*; a man's foster child's foster sister).

Another case of difference is this, that it is not lawful to a man to marry his child's grandmother by *nusub* (because she will be the man's own mother or his wife's mother), but the child's grandmother by fosterage is lawful to the man (that is, according to this rule, there is no prohibition in the following cases, *viz.*, a man's own child's foster grandmother; a man's foster child's grandmother by *nusub* or consanguinity: a man's foster child's foster grandmother).

Another case of difference is this: it is not lawful to a man to marry his brother's or sister's mother by *nusub* or descent (because such mother is either the man's own mother or is the *Mowtoou* of his father), but it is lawful to a man to marry his brother's or sister's mother by fosterage; (that is to say, there is no prohibition in the following cases, *viz.*, the man's consanguine or *nusuby* brother's foster mother: the man's foster brother's consanguine or *nusuby* mother, as when A and B suck the milk of a stranger woman who is not their *nusuby*, or consanguine mother, then A and B are foster brothers; if B has a consanguine mother who has not suckled A, then A can lawfully marry [illegible] and B suck the milk of either's consanguine, or *nusuby* mother, [illegible] mother is unlawful: but if A and B suck the milk of A's own mother, [illegible] it is unlawful to B to marry A's mother; but it is lawful to A to marry B's consanguine or *nusuby* mother: the third case in which there is no prohibition is this; the man's foster brother's foster mother; *e.g.*, A and B suck the milk of a stranger woman; they are foster brothers; but A has also sucked the milk of a woman whose milk was not sucked by B; it is lawful to B to marry this last-mentioned woman).

And we shall mention the rules (or *Masail*, that is, cases) of fosterage hereafter in a separate chapter.

1180. (280.) Now as to those who are prohibited by reason of *Suhreeut* (or connection by carnal intercourse). *Suhreeut* (or connection by carnal intercourse) is established by lawful marriage and by carnal intercourse, whether the carnal intercourse is lawful (as in case of intercourse by right of ownership) or arises from (*Shoobha*, or) doubt of legality (*e.g.*, having connexion with a woman believing her to be his wife, when she is not so, or with a slave, believing her to be his slave, when she is not so, or with his son's slave, believing that a son's slave is lawful to have intercourse with, according to law); or whether the carnal intercourse is of the nature of whoredom (*Zina*).

As to those who are prohibited by reason of lawful marriage. They are those married by the father or the grandfather through the father (that is, the paternal grandfather) or through the mother (that is, maternal grandmother), how high soever. And those married by the son, and the son's son, and the daughter's son, how low soever: and the wife's mother and wife's grandmother, near or remote, and these are prohibited to the man merely by his marrying his wife whether he has had intercourse with her or not; and also wife's daughters and wife's children's daughters (by a pre-

vious husband) how low soever; and these are prohibited only if the man has had sexual intercourse with his wife (not by mere marriage without sexual intercourse).

Now as to those who are prohibited by lawful carnal intercourse. They are those with whom the father or grandfather (paternal or maternal), how high soever, has had carnal intercourse by right of ownership: and those with whom the son, or son's son, how low soever (or daughter's son) has had carnal intercourse (by right of ownership): and the mother of her with whom he has had carnal intercourse (by right of ownership) and her grandmother how high soever; and similarly, the daughter of her with whom he has had such intercourse; and likewise the daughter of the children of her with whom he has had carnal intercourse by right of ownership.

Now as to the woman with whom a man has had carnal intercourse by doubt: she is a female slave who is common to (or held in partnership with) him and another man (this is a case of doubt; because if a slave girl is held in partnership by two men, neither is allowed to have carnal intercourse with her); when one of the two men has had carnal intercourse with her, then to such a man shall be prohibited her roots and branches (that is, women in the ascending and descending line): and the woman (or slave girl, so held in partnership) herself shall be prohibited to the man's roots and branches (that is, to men in the ascending and descending line of the man who has had intercourse with her).

Zina (or unlawful intercourse) in the front organ is tantamount to lawful carnal intercourse according to us (Aboo Haneefa and his disciples, as contra-distinguished from Shafei, who holds a different opinion) in regard to this matter (that is, in establishing prohibition by *Suhreeut*).

1181. (281.) Carnal intercourse with a female minor, who has no desire (*Shuhwut*, or passion) does not establish prohibition of the kind called *Moosahrat*, according to Aboo Haneefa and Mahomed, on whom be peace, whether the man has had intercourse with her by right of ownership, or without right of ownership (that is to say, the words 'without right of ownership' include a case of doubt and a case of whoredom, but exclude the case of marriage).

And Aboo Yusoof, on whom be peace, says, this will establish prohibition of the kind called *Moosahrat* (or prohibition arising from carnal connexion).

1182. (282.) And the lawyers have discussed the question relating to a woman who has reached the period of desire (or passion). Some of them have said that, when she reaches the age of 9 years, she reaches the period of desire (or passion). And a girl of 5 years does not reach the period of desire (or passion), but a girl of 6 years, or 7 years, or 8 years, if she is strong and fat, reaches the period of desire (or passion); but if she is not so (*i.e.*, strong and fat), then she reaches the period of desire (or passion) in 12 years.

And from Aboo Yusoof, on whom be peace, it is reported that if she is a girl of 5 years, but so that girls like her have desire, then she will be said to possess desire (or passion); and no age is fixed in this matter. Aboo Yusoof has reported this tradition from Aboo Haneefa, on whom be peace.

1183. (283.) And (in addition to what is stated in paragraph 281) another tradition, from Aboo Haneefa, on whom be peace, is, if the man has carnal intercourse with her (*i.e.*, with the minor who has no desire, or passion, as in paragraph 281), then, if the two passages have not (by rupture, *Ifza*), became one (so that the intercourse could be said to have taken place in the natural passage), the prohibition of *Moosahrat* shall be established: but if the two passages have become one, then the prohibition shall not be established (because it is not certain that the intercourse has been had in the natural passage, for by unnatural intercourse, *Hoormat-i-Moosahrat* is not established.)

And it is reported by Aboo Yusoof, on whom be peace, in the Nawadir (or Traditions from Aboo Haneefa, which are not generally known, as contradistinguished from Zahir-i-Rawayet, which are traditions known and generally received to be the traditions of Aboo Haneefa, and to be found in the six books of Mahomed, *viz.*, Mubsoot, Zyadat, Jamai Sugheer, Jamai Kubeer, Syur-i-Sugheer, and Syur-i-Kubeer. The Nawadir traditions are found in other works of Mahomed), that if a man has intercourse with a girl, who is a child of five years of age, in the back part, and she dies, and it is not known whether she had desire, then to him shall become prohibited her mother: (because by intercourse in the front part, according to Aboo Yusoof, the prohibition is established, even if the woman has no desire, and such prohibition is established even by sodomy with the girl, although it be not known that she was capable of desire in the event of connexion being had in the natural way: but if it is known that she was capable of such desire, then

also the prohibition shall be established by sodomy; and if it is known she was not capable of such desire, or passion, then the prohibition shall not be established by sodomy: but all this is from the Nawadir, a collection of unknown or unpromulgated traditions: what is the generally received principle is set out in paragraph 289).

1184. (284.) And the lawyer, Aboo Leith, on whom be peace, says, that a girl of an age less than 7 years is not possessed of desire (or passion), and *Fatwa* is based on this rule.

1185. (285.) If the *Moohullil*, (or person who marries a woman for the purpose of rendering the woman lawful to her first husband, who had absolutely or irrevocably divorced her, and was then desirous of marrying her again), has had connexion with the woman, so that the two parts became ruptured into one, then the woman shall not become lawful to the first husband (because lawful connexion is that, which takes place in the natural way, and in this case there is no guarantee that such was the case).

1186. (286.) Now as to prohibition caused (not by actual carnal intercourse, but) by preliminaries to carnal intercourse. If a man touches (with his hand) a woman with desire (or passion), or kisses her with desire (or passion), then the prohibition of *Moosahrat* is established: and if the man denies that there was desire (that is, *Shuhwut*, or passion in the touch, or kiss) then the word to be accepted is the word of the man, unless the touch or kiss was accompanied by a disturbance (*Intishar*, or erection) of the male organ. And contact of bodies (*Moosahrat*) with desire (or passion) is tantamount to kissing.

And if the man has touched her (with his hand), but on the body of the woman is a thick cloth, so that his hand does not feel the warmth of the (body of the) woman, or the softness of her person, the prohibition shall not be established (although the touch was with desire): but if the cloth is thin, so that he can feel the warmth or the softness of her person, the prohibition shall be established in the same way as if he had touched her without the intervention (of the cloth, with passion).

And so also (the prohibition is established) if a man touches (with desire) the sole of her *Khoof* (*i.e.*, her stocking), unless the *Khoof* has leather for the sole, so that the softness of her foot is not felt.

And as regards effectuating prohibition, the touch by the woman of the man is like the touch by the man of the woman (that is, if the woman touches the man with desire, even then prohibition will be established in the same way as when the man touches her with desire).

And if a man kisses the lawyers have discussed the question relating lished, (so that the wife sh the period of desire (or passion). Some of that he kissed her without desire ches the age of 9 years, she reaches the (in the same case), until it is unlawful of 5 years does not reach the passion), prohibition is not est ion) : but because ... or 7 years, or 8 years, arises from desire (or passion at the sa mere touch r passion) ; but if accompanied with passion). period of desire

And to embrace is tantamount to kissing : this is Jamai Kuboor. d that if she is

1187. (287.) And the proof of desire (*Shuhwut*), accor n she will be Hussun Koommy, is * * * * * * A his matter an old man (Sheikh), and an impotent man, the sign of desire is that his heart shall beat with desire, if the heart was not so beating before : but if his heart was already beating with desire (or passion) before this, then the sign of desire (or passion) is, that there shall be an increase in th movement and desire (of the heart). And most of the lawyers have held tha desire (or passion) is when the man's heart inclines towards the woma and there arises a desire in him to have intercourse with her. (This applies to all cases whether young or old, or impotent).

1188. (288.) And looking at the front private part of the woman with desire (or passion) establishes prohibition of *Mooshurat* according to us (that is, Aboo Haneefa and his followers). And the learned have discussed the question * * * * * * * * *

And if a man (even with desire) looks at a woman's back part, then unlawfulness shall not be established.

1189. (289.) And if a man commits sodomy with another man, then the mother or the daughter of the latter will not be unlawful to the former. And in the same way if a man commits sodomy with a woman, then her mother or her daughter shall not be unlawful to him.

1190. (290.) And if a man touches a woman with desire (or passion) * * * * prohibition of *Moosahrat* is established.

1191. (291.) And if a man touches a woman's hair with desire, the learned have said that prohibition of *Moosahrat* is not established : but it is laid down in the Kysaneeat that prohibition is established (in this case).

1192. (292.) If a man misbehaves with a woman (by doing an act sufficient to establish prohibition of *Moosahrat*) and then becomes penitent, he becomes unlawful to her daughter, because the marriage of

r daughter is prohibited to him permanently (and the prohibition is not moved by penitence). And this is proof that unlawfulness is established y unauthorised carnal intercourse in matters in which prohibition of *Moosahrat* is established (by lawful carnal intercourse, that is, in cases in which unlawfulness is established by legal connexion, in those cases unlawfulness is established by illegal connexion; *e.g.*, the daughter of a wife with whom the husband has had connexion is prohibited to the husband for marriage; so also if the man has connexion with the woman without a marriage, her daughter becomes prohibited to him).

1193. (293.) And if a man looks * * * * * * * * * * * * * * * *Hoormut-i-Moosahrat* is established: but * * * * * * * * * * * then (prohibition of *Moosahrat* shall not be established and) to him shall not be prohibited her mother or her daughter; because * * * * * * * * * * * * * And if the woman is on the bank of a tank (*Houz*) or upon a bridge, and * * * * * * unlawfulness shall not be established: and if the woman is in water * * * * * * * * * * * * * * * the unlawfulness will be established.

1194. (294.) When a man marries a woman and retires with her (making *Khilwat,* without actually having intercourse with her), the man being in the fast of *Ramzan,* or having made *Ihram* for the purpose of *Haj,* and he then gives her divorce: it is reported by Hashim from Mahomed, on whom be peace, that it is lawful for him to marry her daughter (because by mere marriage the mother becomes unlawful: the daughter becomes unlawful by carnal intercourse after marriage with the mother, or that which is tantamount to it, *i.e.*, carnal intercourse, which is true retirement; here the fast or *Ihram,* negatives the presumption, which would otherwise arise from the retirement: so that here prohibition of *Moosahrat* is only partially established).

1195. (295.) And if a man looks at a limb other than the front private part with desire (or passion), or if he looks at the front private part (without desire or passion), prohibition shall not be established.

1196. (296.) And if a man assists a woman in getting up to ride or assists her in alighting, and between them is a thick cloth, prohibition shall not be established: and so also prohibition is not established if * * * * * * and likewise, if a man has carnal intercourse with a corpse, prohibition shall not be established.

1197. (297.) The wife with her daughter (by a different husband) who is capable of desire (or passion) is sleeping in a bed. The man stretches forth his arm towards his wife in order that he might draw her towards his own bed to cohabit with her; but his hand reaches the woman's daughter and he pinches (or presses) her (the daughter) with his fingers believing her to be his wife. Then if his hand falls upon the daughter, and the contact brings on desire (or passion) in him, his wife shall become unlawful to him, although he might be under the belief that the daughter was his wife, in consequence of the touch being found with desire; and if the parties differ as regards the question whether the contact was with desire (or passion) in the man, then the word to be accepted is that of the husband, because he denies the prohibition (of his wife to himself).

1198. (298.) And when a man looks at * * * * his daughter without desire (or passion); * * * * * * *

1199 (299.) A woman has a grand-mother who has a husband. The latter becomes unlawful to the woman, if he has intercourse with the grand-mother, whether the grand-mother be from the side of the father (that is, paternal grand-mother) or from the side of the mother (that is, maternal grand-mother). But as regards the husband of the woman's daughter or the husband of her child's daughter, that husband shall become unlawful to the woman, whether he has intercourse or not with that daughter or the child's daughter: because a daughter (of the wife) does not become unlawful (to a man) by mere marriage of the mother (unaccompanied with intercourse) and, therefore, the woman shall not become unlawful to the husband by his merely marrying the grand-mother, (unaccompanied with intercourse): but as regards the mother, she becomes unlawful to a man by his merely marrying her daughter according to us (the Hanifites) and, therefore, she (the woman) shall become unlawful by the mere marriage of her daughter's daughter or son's daughter.

(The rule laid down in the Quran is this:—If a man marries a woman, then by mere marriage unaccompanied with intercourse, the woman's mother shall become unlawful; therefore by mere marriage, the woman's grand-mother shall become unlawful: therefore the rule is that by mere marriage with a woman, the woman's roots become unlawful to the husband of the woman whether the husband has had intercourse with the woman or not. But if a man marries a woman, then the woman's daughter by a previous husband shall become unlawful to the present husband, only if the present husband has had intercourse with the woman:

therefore the woman's daughter's daughter, or the woman's son's daughter shall also become unlawful to the husband only if he has had sexual intercourse and not by mere marriage: that is to say, the woman's branches shall become unlawful to the husband, not by mere marriage, but by marriage accompanied with intercourse).

1200. (300.) And there is no fear for a woman to travel with the son of her husband, because that son is unlawful to her: but he must not assist her in getting up or alighting (that is, he must not hand her up or down), for fear that something might get into his heart (that is, for fear that he might get into a desire or passion).

1201. (301.) A female minor being frightened in her dream flies towards her father's bed whilst she is in a state of nudity, and her father becomes disturbed (with desire or passion) on seeing her, and she is 8 years of age: Sheikh-ool Imam Aboo Bekar Mahomed, son of Fuzul, on whom be peace, says, "I am afraid her mother shall become unlawful to her father."

1202. (302.) And the carnal intercourse by a boy, the like of whom has power for carnal intercourse, is of the same nature as the carnal intercourse by an adult in this matter (that is, in regard to establishing prohibition of *Moosahrat*). And the learned have said that (by way of definition) a boy, the like of whom has power for carnal intercourse, is a boy who (has not attained majority but) can have carnal intercourse and (also) has desire (that is, who at the time of committing the act feels a pleasure) and who is such that women feel abashful at one like him. (When a boy has carnal intercourse and emits, he is of age: when a boy does not emit but still has passion and derives pleasure in the act, and women feel bashful in his presence, then such a boy ranks as of age in establishing prohibition of *Moosahrut*, if intercourse takes place: but any other boy, even if intercourse takes place, does not so rank).

1203. (303.) Now as to women who are not prohibited permanently, (but temporarily) such women are (of) seven (classes).

One class consists of a woman who is in excess of the lawful number: and the lawful number for a free man is four women, whether free or female slaves (that is, a man can marry only four women, whether the women are free women or slave girls belonging to others; because a man cannot marry his own slave girl, so much so that if he should marry the slave girl of another and subsequently purchase her, the marriage comes to an end:

therefore, a man cannot marry more than four women, that is to say, he cannot have more than four wives at any one time; but this number is not restrictive of those who are lawful by right of ownership and who might be of any number).

But as regards a man who is the property of another, he can only marry two women (whether free or slave girls) and not more according to us (the Hanifites).

And if a free man marries five women consecutively, the marriages with the first four are valid, and the marriage of the fifth is not valid: but if he marries all five women by one contract, the marriage of each of them is invalid (or void,—*fasid* is here used to mean *batil*): and so also if a slave marries three women (that is, if the marriage is by different contracts, then the third is void; but if, by one contract, the marriage of each is invalid. *Note.*—The marriages here are all operative instantaneously; if they are dependent, then the rule applicable is that laid down in paragraphs 116 and 117).

1204. (304.) A *Huruby* (an infidel living in the *Dar-ool-hurub*) marries five wives; they all (that is, the husband and the five wives) then become Moslems: then if the *Huruby* had (whilst an infidel) married his wives consecutively (or one after the other), the marriages of the first four wives shall be valid (that is, shall continue to be valid) and separation shall be caused between him and the fifth wife according to all (that is, all the four Imams,—Haneefa, Shafei, Humbul, and Malik): but if he had married all five at once, separation will be effected between him and each of the wives according to Aboo Haneefa and Aboo Yusoof, on whom be peace: and if he had married one wife (by one contract), and then four (by another single contract), then the marriage of one only (that is the first), shall be valid and not of the others. And Mahomed and Zoofur and Shafei have held that the (said) *Huruby* is at liberty to select out of them any four he may like, in what manner soever he might have married them.

1205. (305.) And if a free man marries ten women consecutively (so that the marriages are not operative instantly but are dependent), then the marriage of the 9th and 10th will be valid; because when he married the fifth woman then this marrying the fifth woman would denote that the marriages of the four women prior to this fifth, were invalid; then when he marries the ninth, then this marrying the ninth would denote that the marriages of the four women, before this ninth, were invalid: thus the marriages of the 9th and 10th would be valid. (All these marriages must

be dependent and not operative marriages; because if the marriages are operative from the beginning, then see paragraph 303, the marriages of the first four would be valid: see paragraph 117, where the very principle set out in paragraph 305 is also there set out).

1206. (306.) Another of those classes is (that which relates to) the collection of two sisters in marriage, whether they be free women or female slaves: then if the husband has married them together (that is, by one contract), the marriage with both is void (*batil*): but if he has married them consecutively (that is, one after the other), the marriage with the first is valid. and the marriage with the second is void (*batil*).

1207. (307.) Another of those classes is the collecting together of two sisters in carnal intercourse. When a man has had sexual intercourse with his wife's sister, by doubt (or mistake), then *Iddut* is obligatory on the woman with whom such sexual intercourse was had by doubt: then until her *Iddut* expires, it is not allowable to him to have carnal intercourse with his wife.

And if a man purchases two female slaves who are sisters: it is not allowable to him to have intercourse with them (that is, with both of them): and if he has intercourse with either of them it is not lawful to him to have carnal intercourse with the other until he makes unlawful upon him the front private part of her with whom he has had carnal intercourse by (means of) sale or gift, or *Sudka* (gift), or by making her a *Mookatiba*, or by giving her her freedom, or by giving her in marriage, (to another man), and if he has intercourse with both of them, it is not lawful to him to have intercourse with either of them until he has made unlawful upon him the front private part of the other in the manner stated above: and if he sells one of them (having had intercourse with both) or gives her in marriage (to another man) or makes a gift of her, but the female slave sold is returned on account of defect or (in case of gift) he takes back the gift or (in case of marriage) the husband of the female slave given in marriage divorces her, and her *Iddut* expires, then he shall not have carnal intercourse with either of them until he makes the other unlawful to him in the mode stated above: (before expiry of the *Iddut* of the married slave girl, the master can have sexual intercourse with the woman still his slave girl; because until the expiry of the *Iddut*, the effect of the marriage subsists. Then if the *Iddut* expires, the slave girl becomes lawful to the master, and he must make her unlawful again with a view to have intercourse with her sister).

1208. (308.) Another class is to collect (or bring together) two sisters in constructive carnal intercourse: as in the case of a man becoming owner of the sister of his married wife (whether he has had intercourse with the wife or not); in which case he shall not have intercourse with the woman he so comes to own: and if a man becomes the owner of a girl and has sexual intercourse with her, and he then marries her sister, the marriage shall be valid according to us (the *Hanifites*) but he shall not have carnal intercourse with either of them until he makes the purchased slave girl unlawful to him in the manner stated above.

1209. (309.) And if a man marries two sisters together (by one contract) and their marriage (consequently) becomes invalid (*fasid*): then the husband (before intercourse) separates from them, it is lawful for him to marry either of them immediately (that is, there being no intercourse with either, there is no *Iddut*, and he can immediately marry whichever he likes): but if having married them by one contract—and their marriage is consequently invalid—(*fasid*), he has had sexual intercourse with both of them, it is obligatory on them to observe the *Iddut;* and as long as they are in the *Iddut*, it is not lawful for the man to marry either of them: then when the *Iddut* of one expires, it is lawful to him to marry the other (whose *Iddut* has not expired but he cannot marry the first, because the *Iddut* of the second has not expired).

1210. (310.) And if a man marries a woman, and he afterwards marries her sister, the marriage of the first is valid and that of the second is void (*batil*): therefore if he has had intercourse with the second, he shall not have intercourse with the first until the *Iddut* of the second has expired.

1211. (311.) Another of those classes is when the man brings together two sisters during the marriage of (one of the two) and in the *Iddut* of the marriage (of the other).

When a man marries a woman whilst her sister is observing her *Iddut*, arising from (even) an irreversible (or *bain*) divorce (given by him) after a valid (*Suheeh*) marriage or is observing her *Iddut* arising from an invalid (*fasid*) marriage (with him), the marriage is not valid according to us (the *Hanifites*); but if the husband of the woman observing the *Iddut* says, "she has informed me that verily her *Iddut* has expired" and if this has been said at a time when it is likely that the *Iddut* could expire within such time, it is lawful for him to marry the sister of the woman,

or even four other different women, according to us (the *Hanifites*): but Zoofar and Shafei, on whom be peace, have differed from this view in case the divorce was reversible. (They hold that if the divorce was reversible, then the subsequent marriage will not be valid merely because the husband says as aforesaid).

1212. (312.) And another class is the bringing together of two sisters by means of marriage (of one) and the *Iddut* of freedom (*Itak*) of the other. How that takes place is this: when a man gives liberty to his female slave, who has given birth to a child by him (*Oomm-i-Wulud*), it is obligatory on her to observe *Iddut* for three periods of purity (*Hyz*). And it is not unlawful to him, during her *Iddut*, to marry her sister or four other women different from her (the *Oomm-i-Wulud*), according to Zoofar on whom be peace; but Aboo Yusoof and Mahomed, on whom be peace, have laid down that he can do either of the two (that is, marry the sister of the Oomm-i-Wulud, or any other four women). And Aboo Haneefa, on whom be peace, says, it is not lawful to marry the sister, but it is lawful to marry other four.

1213. (313.) Another class consists in bringing together two women who are uterine relatives of each other (*Zuwatoo Rahum*), and are forbidden to each other (*Moohurrum, i.e.*, if one were a man, then they would be forbidden to each other).

It is not lawful to a man to marry a woman whose father's sister is already his wife: or whose mother's sister is already his wife: or whose sister's daughter is already his wife, or whose brother's daughter is already his wife.

And if he marries both of them at once (by one contract), the marriage of neither shall be valid.

(*Note.*—The rule here laid down would be applicable even if the women are unlawful to each other, although not through the *uterus*, as in the case of fosterage.)

1214. (314.) The lawyers have held that two women, such that in case one of them had been a man and the other a woman, marriage between them would be unlawful, cannot be validly brought together (as wives by means of marriage), except in one case, *viz.*, when a man brings together (in marriage) a woman and the daughter of her previous husband (by another wife); this is valid (that is, it is valid for a man to marry a woman and also her former husband's daughter by another wife; because

the prohibition between those two women, if one of them were to be considered a man is not mutual. Suppose the husband's daughter to be a man, then this man could not marry the woman who is his father's wife or his step-mother, and he is her husband's son: but if the woman, that is, the step-mother, were to be considered a man, then the daughter would not be unlawful to him, because she would be a stranger to him, for by supposing the woman to be a man, there would be no husband in the case. See Vol. II, Shurah Vikaya, p. 10.).

1215. (315.) Another class consists in bringing together in marriage a free woman and a female slave. If a man marries a free woman and a female slave together (that is, by one contract) then the marriage of the free woman shall be valid and that of the female slave shall be void (*batil*): and if he first marries a female slave and then a free woman, then the marriage with both shall be valid: but if he first marries a free woman and then marries a female slave, then the marriage of the female slave shall not be valid.

And if a man marries a female slave, while his previous wife, who was a free woman, is in her *Iddut* (having been divorced by him), then this marriage is not valid according to Aboo Haneefa, on whom be peace, but his two disciples have differed from him.

And if a man brings together in one contract of marriage five free women and four female slaves, then the marriage of the female slaves is valid (because there being one contract, the marriage of more than four free women is invalid, and the female slaves being four, their marriage is valid: but if there had been four free women and five female slaves, the marriage of the free women would have been valid and that of the female slaves invalid: and if there were two free women and three female slaves, then the marriage of the two free women is valid, and that of the three female slaves is invalid: if there had been two free women and two female slaves, then the marriage of the free women would be valid and that of the female slaves invalid).

And if a man marries a free woman and a female slave together, by one contract, whilst the free woman is either in the *Nikah* of another man or in the *Iddut* of another, then the marriage of the female slave is valid.

And if a man marries a female slave without the permission of her master (the marriage is thus a dependent and not an operative marriage), and he then marries a free woman (this marriage being operative) the marriage with the female slave is void (*batil*), and the permission of the

master shall not be operative after this (after the marriage with the free woman).

And it is not competent to a slave to marry a female slave, after marrying a free woman, according to us (the Hanifites), but Shafei, on whom be peace, has taken a different view: (if a free man marries a free woman, he cannot afterwards marry a female slave, according to Aboo Haneefa, because this is an insult to the free wife, and Shafei agrees in this view in regard to a free man; and in case of a slave, Aboo Haneefa says, the same reasoning holds good, but Shafei says, when the free woman accepted a slave for her husband, she tolerated an insult, and can, therefore, endure a further insult by her husband marrying a female slave upon her).

And, according to us, ability to marry a free woman (such ability being regarded from the point of view as to his means to pay her dower and her maintenance) does not prevent a man marrying (instead of a free woman) a female slave, (but Shafei has taken a different view).

1216. (316.) And amongst the women who are prohibited are infidel (*Kafira*) women with (a) particular (kind of) infidelism (*Koofr*, *i.e.*, infidel women who are not *Kitabeea*). An idolatress is not lawful to a Moslem: but she is lawful to all infidels (*Kafirs* whether *Kitabeea* or not), except to a *Moortud* (one who has forsaken the Moslem religion).

And the marriage of a woman who has forsaken the Mahomedan religion is not valid with anybody (whether he be a *Kafir* or a Moslem). And a *Majoosee* woman (fire-worshipper) is not lawful to a Mahomedan, but she is lawful to all infidels (*Kafirs*, whether *Kitabeea* or not) except to one who had been a Mahomedan but who has forsaken the Mahomedan religion.

And the marriage of a *Sabeea* woman (an infidel tribe who, according to Aboo Haneefa, are *Kitabeeas*, but according to his disciples are star-worshippers) is lawful to a Moslem according to Aboo Haneefa, on whom be peace.

And to a Mahomedan it is valid to marry a Jewess, or a Christian woman.

And if a Moslem marries a *Kitabeea* (but an infidel) woman who is a *Hurubee* (or resident of the *Darool Hurub*, and the marriage also takes place in the *Darool Hurub*) this marriage is valid; but it is abominable (*Mukrooh*, owing to the marriage taking place in the *Darool Hurub*): and if he comes out with her to *Darool Islam*, they shall continue to remain as married (that is, the marriage shall continue to be valid and they need not marry again).

A man who is a *Moobuyyiz* (a class of infidel fire-worshippers, who dress in white clothes) marries a woman who is of the same class, in the presence of witnesses, with (the assistance of) a guardian: they both then become Moslems, abandoning their belief in their heretic doctrines from their heart; and the husband either had intercourse with the wife or not: the wife then, after having so accepted the Mahomedan faith, marries another man, before separation has taken place between her and her first husband: then Sheikh-ool-Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, has said, if they only apparently profess Islam but in reality believe in infidelism, their marriage (contracted whilst in a state of infidelism) shall continue to be valid (and they shall be treated as Moslems), and therefore the marriage of the woman with the second husband is not valid (because their marriage whilst they were in a state of infidelism enures in their altered condition); but if they or either of them shew infidelism (that is, having become Mahomedans, they again conform to their old infidel ways by open acts, whatever might be their belief) they shall be considered as *Moortud*; (that is to say, one or both shall be considered *Moortud*, as the case may be) and their marriage, contracted whilst they were infidels, shall not be considered valid (because the marriage of a *Moortud* is annulled by his merely forsaking the Mahomedan religion) and, therefore, the second marriage of the woman is valid.

1217. (317.) And it is lawful to a free man to marry a female slave who is a *Kitabeea* according to us (the Hanifites), but Shafei has taken a different view.

1218. (318.) And according to all (the four Imams) it is not lawful to marry the wife of another, or to marry another's wife who is in her *Iddut*.

And if a man marries the wife of another without knowing that she is the wife of another (the marriage being a *fasid* marriage) and has carnal intercourse with her, it is obligatory on her to observe the *Iddut*: but if he knows that she is the wife of another, and has carnal intercourse with her (with such knowledge), it is not obligatory on her to observe the *Iddut* (because *Iddut* is obligatory in cases of marriage and not in cases of *Zina*); so that it is not unlawful for her (first) husband to have carnal intercourse with her.

1219. (319.) And to a woman, who is a *Moohagira* (one who has

left the *Darool-Hurub* and come towards the *Darool Islam*) it is not obligatory to observe *Iddut*, and it is lawful for her to marry at once, according to Aboo Haneefa, on whom be peace. (That is, the woman, having been a *Kafir* in the *Darool- Hurub*, emigrates into the *Darool Islam* as a Mahomedan; her previous marriage comes to an end; so also, as regards, the woman, if she migrates as a *Kafir*: the reason is, that the husband who is left behind is treated as a stone, whereas *Iddut* is obligatory in reference to a man). But his two disciples have held that it is obligatory on her to observe the *Iddut*, and marriage by her is not lawful before expiry of the *Iddut*.

If the husband leaves the *Darool-Hurub* (instead of the woman, as in the case first supposed) it is competent to him to marry his wife's sister, or any four women other than his wife's sister.

And if the woman, who has left the *Darool-Hurub* (in the supposed case) is pregnant, then she cannot marry (at once, before delivery), according to a tradition reported by Mahomed, on whom be peace, from Aboo Haneefa, on whom be peace; whereas Aboo Yusoof reports from Aboo Haneefa, on whom be peace, that it is competent to her to marry, but the (new) husband shall not have intercourse with her until delivery.

1220. (320.) And it is lawful for a woman, who is pregnant by means of *Zina* (or illicit connexion) to marry, but her husband shall not have intercourse with her until she is delivered, according to Aboo Haneefa and Mahomed, on whom be peace; but Aboo Yusoof, on whom be peace, says, that (in such a case) her marriage shall not be valid.

1221. (321.) When a man sees a woman committing *Zina* (that is, the man sees, or knows full well that she has illicit intercourse with others) and (with such knowledge) marries her, the marriage shall be valid, and it is competent to the husband to have intercourse with her without *Istibrai* (*i.e.*, waiting for the expiry of one period of menses, to see that her womb is pure): but Mahomed, on whom be peace, says, "I do not approve that he should have intercourse with her without *Istibrai* (*i.e.*, without waiting for one period of menses to purify her womb).

1222. (322.) When a *Zimmee* (an infidel, who resides in *Darool Islam*) marries an infidel woman, who is observing her *Iddut*, as regards an infidel husband, the marriage is valid according to Aboo Haneefa, on whom be peace, (if the *Zimmee* believes that it was not necessary for the woman to observe any *Iddut*); and if both (that is, the *Zimmee*, who is

the second husband, and the woman) become Moslems (after marriage) they shall remain in their marriage state: (that is, the marriage shall continue to be valid); and if they (*i.e.*, the husband and wife) have recourse to the Kazee in regard to the matter (that is, they say, "We have married before the *Iddut* expired; is the marriage valid?"). The Kazee shall not render void the marriage that took place between them (because the *Nikah* being valid whilst the parties were *Kafirs*, and their becoming Moslems is no nullification of the marriage, the Kazee, therefore, cannot hold such marriage to be invalid): but Aboo Yusoof and Mahomed have taken a different view (in regard to all these matters, that is, they say the marriage is not valid during the *Iddut*; and there being no marriage between them whilst they were *Kafirs*, there is no marriage between them when they become Moslems: and if they refer to the Kazee, he should say "There is no marriage between you two").

And if a *Kitabeea* woman is in the *Iddut* of a Moslem, it is not valid for a Moslem or for a *Zimmee* to marry her until the expiry of her *Iddut*.

1223. (323.) A *Zimmee* gives an irreversible (or *bain*) divorce to his wife who is a *Zimmee* woman: then a Moslem or a *Zimmee* marries her at the instant of the divorce; some of the *Mashaikhs*, on whom be peace, have said, that it is lawful for him (the new husband) to marry her, but it is not permissible (*Moobah*) to him to have intercourse, until he has purified her (womb) for (the period of) one of her menses, according to Aboo Haneefa, on whom be peace: but according to the view of his two disciples, her marriage is void (*batil*) until she shall have observed an *Iddut* extending over a period of three of her menses. And the authors of the Amalee (a work compiled by several authors) have reported a tradition from Aboo Haneefa, on whom be peace, that no *Iddut* is obligatory on her.

And Shumshool Ayma Suruklısy, on whom be peace, has said, that the *Mashaikhs* have differed in the matter of *Iddut* being obligatory upon the *Zimmee* woman according to the view of Aboo Haneefa (that is, the *Mashaikhs* have differed as to the correct view which Aboo Haneefa took of the question whether *Iddut* would be obligatory on a *Zimmee* woman when she has been irreversibly divorced by her *Zimmee* husband; but if such divorce has been given by a Moslem, then without any such difference *Iddut* is obligatory on her): some of them have said (as the authors of the Amalee have held) that *Iddut* is not obligatory on her: whilst others have held that *Iddut* is obligatory on her, but the *Iddut* is a weak one, such that it does not prevent marriage; just as *Istibrai*, or purifying

the womb, is (weak) amongst the Moslems; (that is to say, if a Moslem purchases a slave girl, or marries a *Zanee* woman, then it is proper for him to wait for the purification of her womb: but this purification is a weak matter, and does not absolutely prevent validity of intercourse. (See paragraph 321); contrary to the case where the *Zimmee* woman is observing her *Iddut* on account of a Moslem; for this (class of) *Iddut* is strong and prevents marriage (during the period the same is being observed. See paragraph 222).

1224. (324.) A man has intercourse with the wife of his father, (*i.e.*, his step-mother), she will become unlawful to his father: and the father shall be liable for the whole of the dower, if he has had intercourse with her: and if the son says "I knew that she was unlawful to me;" or he says, "I intended to make the marriage (of the woman with my father), invalid," then he shall be liable to punishment (*Hudd*), but the father shall not be entitled to look to the son for compensation for that which he has had to pay (to his wife), on account of her dower; because liability of the son to punishment prevents obligation for damages: but if the son was not aware of this (that the woman was unlawful to him) and he has had intercourse with her on account of doubt (*Shoobha*), he shall not be liable to punishment (*Hudd*), but the woman shall become unlawful to his father, who shall be liable to dower if he has had intercourse with her, and the father shall not be entitled to look to the son (for compensation for the dower paid by him) because the son did not intend to make the marriage (of the woman with the father) invalid.

1225. (325.) And if the son kisses his father's wife with passion, the woman shall become unlawful to his father, who shall be liable to dower, if he has had intercourse with her: and if the son says, "I intended to make the marriage (of the woman with my father) invalid," then the father shall look to the son for what the father might be obliged to pay by way of damages on account of the dower (because mere kissing does not involve *Hudd*): but if the son did not intend to make the marriage invalid, then the father shall not look to the son (for the compensation).

1226. (326.) And it is not lawful to a man to marry a free woman, whom he has thrice divorced, before a second husband shall have reached her (that is, shall have had intercourse with her): neither shall he marry a female slave, whom he has twice divorced (before a second husband shall have reached her and has had intercourse with her, so as to

make her lawful to her first husband): and in the same way (as it is not lawful for the man to marry the female slave whom he has divorced twice, as aforesaid, until she shall have had intercourse with a second husband), so it is not lawful to him to have intercourse with her by right of ownership (as, for instance, if he were, after the two divorces, to purchase her from her master).

SECTION II.

ON THE ADMISSION OF PROHIBITION BY THE SPOUSES, AND ON THE INVALIDITY OF MARRIAGE BY REASON OF "NUSUB" (CONSANGUINITY) AND THE AVOIDANCE "(BOOTLAN)" OF MARRIAGE BY (REASON OF) RIGHT OF OWNERSHIP.

1227. (327.) When a woman, who has been divorced three times by her husband, comes to him, (he being) her first husband, and says, "I married a second husband, who has had intercourse with me and has divorced me, and the period of my *Iddut* has expired;" then if she is fit to be believed (by her general character), and it occurs to the first husband that she is truthful and she makes this statement after a time, so that it is possible that two periods of *Iddut* (*viz.*, one *Iddut* after the divorce by the first husband and another *Iddut* after the divorce by the second husband) might have expired, such time being four months (at least) or more, it shall be lawful to the first husband to marry her: but if she makes this statement after a time, so that it is not possible that two periods of *Iddut* could have expired, then it shall not be lawful to him to marry her. And so also if the woman makes an admission of this (that is, of the second marriage and intercourse by the second husband and the expiry of the two *Idduts*), but the second husband denies the same, it shall be lawful to her to marry the first husband (on the same condition regarding her truthfulness and the expiry of the time); and if the second husband admits (all) this, but the woman denies that the second husband has had intercourse with her, it shall not be lawful to the first husband to marry her (because intercourse is a thing of which she is more competent to speak).

And if the first husband marries her after a time (sufficient for the expiry of the *Idduts*) without the woman having made any statement to him, but she afterwards (*i.e.*, after the marriage) says, "Thou didst marry me when I was in the *Iddut* of the second husband," or she says, "I did marry the second husband, but he has had no intercourse with me;" then

the lawyers have held that if the woman was aware of the conditions which should render her lawful to the first husband, her word shall not be accepted (because it would then appear that she is dissatisfied with her first husband and is desirous of getting rid of him), and it is competent to the first husband to retain her; but if she was not aware of such conditions, then her word shall be accepted.

1228. (328.) And similarly if a man (that is, the second husband) marries a woman who had been married to another person (that is, the first husband) who had divorced her, and the woman says to the second husband "thou did'st marry me whilst I was in the *Iddut* of my first husband," then Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says,—If between the second marriage and the divorce by her first husband two months have elapsed, her statement shall not be accepted, according to the view of Aboo Haneefa and Aboo Yusoof, on whom be peace, and her readiness for (the second) marriage shall be (constituted as an) admission on her part of the expiry of the *Iddut* (consequent on the divorce by the first husband): but if between the divorce by the first husband and marriage by the second husband, less than two months have elapsed, then her word shall be accepted, and separation shall be caused between her and the second husband.

But on the contrary, where a man divorces his wife thrice, and he then marries her after a time (sufficient for the expiry of the *Iddut*, after the divorce by the first husband and after the divorce by the second husband), and the woman then (after the marriage with the first husband) says (to him), "Thou did'st marry me before I married a second husband:" (in this case), her word shall be accepted; and her readiness to marry the first husband shall not be (construed as an) admission on behalf of the woman of the fact that she had married another husband, because the expiry of the *Iddut* (as in the first case) cannot be ascertained but by her word, and therefore her readiness to marry has been rendered equivalent to an admission on her behalf that the *Iddut* has expired (and therefore, in the first case, her acts belie her subsequent statement); but marriage (in the second case on the question whether she had married a second husband or not) does not stand on such a footing (that is, on the footing that it could not be known except by her word), because knowledge of the fact of the second marriage is possible (by other means than her readiness to marry or her statement) and therefore readiness on her part (to marry) is not rendered an admission of the fact that (a second) marriage

(of the woman) had taken place. (The principle is, that what depends on her own knowledge, *e.g.*, occurrence of menses and expiry of *Iddut* must be presumed against her by her readiness to marry, but not so, a fact which could be ascertained and known otherwise than through her agency. Therefore her readiness to marry the first husband is not contradictory of her subsequent statement that she had married a second husband, and therefore her statement that she had not married a second husband shall be accepted: her readiness to marry can only be construed as an admission when the admission is in regard to a matter which is within her special knowledge, as the expiry of her *Iddut*; but not in regard to a matter which can be otherwise ascertained).

Therefore if the first husband marries her after a few months (after having himself divorced her thrice, such few months being sufficient for the expiry of the *Idduts* after divorce by the first husband and after divorce by the second husband), and after this marriage, says to her, "I married thee before the second husband had intercourse with thee," or he says, "I married thee before the second husband married thee:" and the woman says "No; on the contrary, it (your marrying me) was afterwards (that is, after the second husband had had intercourse with me, or after my marriage with the second husband)," her word shall be accepted; but the marriage shall be invalid owing to the husband's admission (of a fact which renders the marriage invalid) and she is entitled to receive from him half of the dower named (or fixed at the marriage) if the husband has not had intercourse with her, and the whole of the dower if he has had intercourse with her.

1229. (329.) When a man marries a woman, who had a husband by whom she had been divorced; then the second husband says, "I married thee before the expiry of the *Iddut* (consequent on divorce by the first husband);" but the woman says, "Verily, after the divorce I had abortion of a child whose figure was formed," the word to be accepted is that of the husband, and separation shall be effected between them (because her statement was ambiguous; she did not say the abortion occurred before the second marriage: the formation of the figure has been put into her speech because abortion in order to constitute the full period of *Iddut*, must be of a formed child): but if she had said after the second marriage, "I had before thy marriage with me and after the divorce by the first husband, abortion of a child whose figure was formed:" and the husband says, "I married thee before expiry of the *Iddut*;" her word shall be accepted, but separation shall be caused between them, and she shall be

entitled to receive from him (the whole of) the dower if he has had intercourse with her, and half of the dower if he has not had intercourse with her: and in the first case, separation will (also) be caused between the parties, but the husband shall not be liable for dower if he has not had intercourse with her (because, in the first case, the second marriage was found during the *Iddut* of the first marriage, and marriage during *Iddut* is *fasid*, and in cases of *fasid* marriages, dower is not due without intercourse: and in the second case, according to her statement, the marriage took place after the *Iddut*, because her *Iddut* expired with the birth of the formed fœtus, and the marriage was, therefore, valid, and in cases of valid marriages, half of the dower becomes due by the reason of the marriage without intercourse, and full dower becomes due after intercourse).

1230. (330.) A woman has been given in marriage (by her father) to a man who has intercourse with her; then the woman says, "I did not consent to the marriage contracted by my father, and verily did I repudiate the marriage contracted by my father when I came to know of it" and she brings witnesses (*byyuna*) to prove it (the repudiation by her); Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says her proof (*byyuna*) shall be accepted to establish repudiation of marriage: and Kazee Imam Aboo Ally, of Nusuf, on whom be peace, says that her proof (*byyuna*) shall not be accepted (to establish repudiation) because (the fact of) her furnishing opportunity (for carnal intercourse) is tantamount to an admission of the validity of the marriage (that is, it amounts to consent to the marriage); therefore the woman becomes a falsifier of what is obvious.

1231. (331.) A man marries a woman: he then makes an admission that so and so had married her and had divorced her, and that the *Iddut* of the woman had expired, and that after this he had married her: but the woman says that the so and so is still her husband, and that he did not divorce her: then no separation shall be caused between them: then if the absent husband (the so and so, her first husband) appears and denies the divorce, the Kazee shall assign the woman to him, and shall effect a separation between her and the second husband: but if the first husband (the so and so, who appears and) admits the marriage and divorce, and that the *Iddut* had expired (before the second marriage) and if the woman gives him the lie (or falsifies him) regarding the divorce (saying he did not divorce her), then the divorce shall (now) be caused upon her, and it shall

be obligatory on her to observe the *Iddut* as if he had at present divorced her, and separation will be caused between her and the second husband: but if the woman testifies to the truth of what the first husband says (regarding the divorce and the expiry of the *Iddut*), the woman shall belong to the second husband: but if she denies what the first husband has admitted regarding the marriage (itself) with him and the divorce by him, the woman shall belong to the second husband.

1232. (332.) And if a man marries a woman and then says, "There was a husband to her before me, and he had divorced her, and her *Iddut* had expired," but the woman says, "He (the former husband) did not divorce me, and I am his wife;" and the first husband says, "I divorced thee, and thy *Iddut* did expire;" the word to be accepted is that of him (the second husband).

1233. (333.) A man marries a woman: the woman then says, "Thou didst marry me without witnesses" or "whilst I was in the *Iddut* (in relation to my former husband)," or "I was a female slave and thou didst marry me without the permission of my master," or "Thou didst marry me whilst I was a *Mujoosee* (or fire-worshipper; be it noted that a Mahomedan cannot marry a woman who is not *Ahl-i-kitab*)"; and the husband denies this statement, and claims to have married her validly: the word to be accepted is that of the husband.

But if the husband claims that the marriage was invalid for any of the reasons mentioned above (himself making the allegations attributed above to the woman) and the woman denies the husband's statement, and claims validity of the marriage, then (the husband's word shall be accepted and) separation shall be effected between them; and she shall be entitled to half of the dower if the husband has not had intercouse with her, and to the whole of the dower if he has had intercourse with her.

1234. (334.) A man admits that this woman is his mother, or his foster sister, or his daughter: the man then intends (or contemplates) marrying the woman, and says, "I (merely) suspected so", or "made a slip of the tongue (*Khuta*)", or "made a mistake, (when making the above admission)"; and the woman bears out (or testifies to) the claim of the man, that he made the mistake (&c)., he shall be entitled to marry her: but if the man (insists on his admission, or) remains fixed in his admission, and says, "what I stated is true," it is not competent to him to marry her (even if, in reality, the woman might be a stranger to him).

But if this admission of the man takes place after the marriage, separation shall be effected between them, if he continues fixed (and determined) in his admission.

And similarly if the woman makes an admission of (all) this (that she is his mother, or foster sister, or daughter), and the husband (that is, the man) denies it, but the woman afterwards falsifies herself and says, "I made a slip (*Khuta*)", or "mistake (*Ghulut*)", and the man then marries her, the marriage shall be valid : but if her admission of this is after marriage, they shall continue to remain married (that is, their marriage shall subsist, her statement, which she subsequently denies by falsifying herself, going for nothing).

1235. (335.) And if a man marries a woman, and after the marriage says, "this is my sister," or "my daughter," or "my foster mother;" but afterwards he says, "I (merely) suspected so, and the fact is not as I have said;" the marriage between them shall not be invalid: but if he remains fixed in his admission and says, "what I stated was true" or he calls upon witnesses to be witnesses of his statement, separation shall be effected between them: and if he afterwards (*i.e.*, after the separation by the Kazee) denies, his denial shall be of no avail to him.

Similarly, if he (after marriage) says, "This is my daughter," or "my sister," but her descent from another is known, and the man after that says, "I (merely) suspected so," he shall be believed (by the Kazee).

1236. (336.) And if a man says to his male slave or to his female slave, "This is my son," or "my daughter :" they shall be set free, and it is not a condition that the man should continue to remain fixed in his admission (in order that the freedom should come into operation).

And, similarly, if a man says of his wife, "This is my daughter by *Nusub* (or consanguinity)", the fact being that her descent (or *Nusub*) is known, no separation shall be effected between them, although the woman (as far as age is concerned) is such that one like her could have been procreated by one like the man (*that is, although their ages admit that the woman might* be the daughter of the man, and the man the father of the woman, but if the man insists in this statement, then the Kazee shall separate them).

And, similarly, if a man says (of his wife), "This is my mother," the fact being that he has a mother well-known (no separation shall be caused, because *Hakeekut*, or *Mujaz*, is neither of them applicable here).

But if he says of her, "This is my daughter," the fact being that her

descent (*Nusub*) is not known, and one like her (in point of age) could be procreated by one like him, and the man insists in his admission, separation shall be caused between them: and if the woman (also) admits that she is his daughter, the descent or (*Nusub*) shall be established, if (in point of age) one like the woman could be procreated by one like the man; but if one like her could not be procreated by one like him, the descent (or *Nusub*) shall not be established, and no separation shall be caused between them (although the husband alone makes the admission, as aforesaid, or both of them agree in making the admission, as aforesaid).

1237. (337.) The right of ownership prevents marriage being contracted with the master (that is, the master's marriage with his female slave is not valid). When a man marries his female slave, or his *Mookatuba* (a female slave whose freedom has been promised on certain terms), or his *Moodubbura* (a female slave whose freedom has been promised after death), or his *Oomm-i-Wulud* (a female slave who has borne a child to the *Mowla*, who has acknowledged the paternity of the first child), or his female slave, whom he owns in fraction, this marriage shall not be held to be a marriage.

And if he marries the female slave of another person, and afterwards becomes her owner, or becomes the owner of a fraction of her, the marriage shall become void (*batil*).

And if a (*Mazoon*) a slave who has permission (from his master to enter into a trade) and a *Moodubbur* purchase the women married by them, their marriage shall not be void (because whatever they purchase enures to the benefit of their master, and their right of property in the thing purchased is not established).

And, similarly, if a *Mookatub* purchases his wife, his marriage shall not be invalid (*Fasid*).

But if a *Mookatub* purchases a female slave and then marries her, the marriage shall not be valid (because the permission of the master is wanting).

And if a free man purchases his wife (who, before marriage, was the slave of somebody else) with an optional condition (saying "I have option of three days in regard to the purchase") his marriage shall not be void (*batil*) according too Aboo Haneefa (because Aboo Haneefa says, in case of purchase with option, the property goes out of the ownership of the vendor but does not enter into the owership of the purchaser during the period of option: therefore, in this case during the period of the option, the husband is not

the owner of his wife, and the marriage is not void during such period; but it shall be void after the lapse of the option if he confirms the purchase.)

And, similarly, if a woman gives herself in marriage to her slave, or if a slave *Mookatub* marries his female master, this marriage is not valid: and if the *Mookatub* husband has carnal intercourse with her, he shall be liable to *Ookur* (but the slave is not so liable because he has no property in his own right; but a *Mookatuba* can have property).

And, similarly, if a man marries his female *Mookatuba* slave, the marriage is not valid, and if he has carnal intercourse with her (after marriage), he shall be liable to *Ookur*; because when the *Nikah* is not fit to be recognised, it shall be considered as if it never existed (and, therefore, intercourse is found with a *Mookatuba*, that is, a female slave who has been permitted her freedom, on condition, say, of earning so much for her master, and with such a slave intercourse is prohibited, but intercourse having taken place in the marriage, liability to *Ookur* arises: *Ookur* being payable in *fasid* marriages after intercourse).

And if the male *Mookatub* slave gets his freedom after marrying his female master, the marriage (which is *fasid*, as aforesaid) shall not become converted into a valid one.

And if a male *Mookatub* slave marries the daughter of his master with the permission of the master, this marriage is lawful: and if the master dies after the marriage (and the *Mookatub* becomes, in one sense, the property of that daughter) the marriage shall not be void (because the daughter does not become his full owner) after this (the death of the master) if the *Mookatub* becomes free, the marriage shall subsist, but if the *Mookatub* is unable to obtain his freedom (by earning the stipulated amount within the specified period) and (consequently) reverts to slavery, the marriage of the daughter shall become void, and the whole of the dower shall cease to become payable, if this (that is, the avoidance of the marriage) takes place before carnal intercourse: but if the same has been after carnal intercourse, then in proportion to her share (according to her right of inheritance to the father) in the ownership of the husband (the slave), her dower shall cease (*sakit*) and the share of other heirs (by inheritance to the father) in the slave, shall continue (that is, her dower, in proportion to the share of other heirs, shall subsist).

And if a *Mookatub* slave marries the daughter of his master, after the death of the master, the marriage shall not be valid (because right of ownership prevents validity of marriage).

1238. (338.) And if a man marries the female slave of his son, the marriage is valid according to us: and if she produces children by the man, they will be free as against their master (the son); because the children follow their mother in the status of slavery: therefore, when the master (the son) becomes the owner of his brother, the slave shall be free: and the female slave shall not be the *Oomm-i-Wulud* of the father (who married her) according to us (the father not being her master); but Zoofar has taken a different view. And so also if she (the female slave of the son) gives birth to children by him (the father of the son) by an invalid (*fasid*) marriage, or by carnal intercourse by reason of doubt (that is, the children shall become free, but she will not be the father's *Oomm-i-Wulud* with the same difference of opinion on the part of Zoofar). But if she gives birth (to children) by him (the father) by reason of whoredom (or illicit intercourse, *Fujoor*), then the female slave of the son shall become the *Oomm-i-Wulud* of the father (because if the father cohabits with his son's slave, he is bound to pay him her price, and, therefore, she becomes the father's property; but he must, as in the case of a child by his own slave girl, claim the parentage).

1239. (339.) And if the son marries the female slave of his father, with the father's permission, the marriage shall be valid; and if she gives birth to children by the son, the children shall be free; because the father has become the owner of his son's sons; but the female slave shall not become the *Oomm-i-Wulud* of the son; because she is not the property of the son: and if the son has carnal intercourse with her (the father's female slave) without marriage or without doubt of marriage, then the parentage (of the children so begotten) shall not be established in the son (because *Nusub*, or parentage, is established by marriage, or doubt of marriage, and here the connexion was that of whoredom, or concubinage), although the son might claim the child: then if the father should support the son (in the declaration) that he (the son) has had carnal intercourse with her and that the child was born of him (the son), then the child shall be free as against the father, on account of the admission of the father (although the *Nusub* of the child shall not be established in the son); because if the father (himself) were to become owner of his (own) son (or child) born of whoredom (or concubinage, *Zina*) then the son (or child) shall be free as against him (the father), and so also if he (the father) becomes owner of his son's son by (*Zina*, or) whoredom (that is, the son's son shall become free): but if the son says, "I knew that she (the father's female slave) was not lawful

to me," then he shall be liable to punishment (*Hudd*) ; but if he (the son) says, "I believed, that she (the father's female slave) was lawful to me," he shall not be liable to punishment (*Hudd*).

1240. (340.) A male minor and a female minor are so that between them there is a doubt of fosterage, but the reality of this is not known : they (the learned) have said that there is no fear in the marriage between them : but this (that is, the validity of the marriage) is when no man gives any information about it (the fosterage) : but if information of it is given by a just and righteous man, so that his word can be acted on, then the marriage between them is not valid (*Jaiz*).

And if information is received (of the fact of fosterage) after the marriage, when they have grown up, then it is safe that the man (*i.e.*, the husband) should separate from her: (because) it is reported from the Prophet of God, on whom be the praise of God, that he directed separation (in such a case).

1241. (341.) A girl has been suckled by a large number of the tribe of a village (*Kurya*), whether those who suckled her might form a large or a small portion of the people of the village, and it cannot be known who suckled her; one of the villagers contemplates marrying her: Abool Kassim Saffar, on whom be peace, has said that if he can find no trace as to who suckled her, and no person bears witness before him as to who suckled her, he shall be at liberty to marry her.

SECTION III.

ON CASES ON "NUSUB" (DESCENT).

1242. (342.) A man marries a woman by way of an invalid (*fasid*) marriage, and he then has intercourse with her: the woman then gives birth to a child at six months (that is, exactly six months after the hour of the marriage), then the descent of the child shall (according to Aboo Haneefa and Aboo Yusoof) be established from him (although the birth might have been within six months from the hour of intercourse).

And the learned have differed in reckoning this time (that is, the hour of expiry of six months) whether the six months are to be reckoned from the time of the marriage or from the time of the intercourse: Aboo Haneefa and Aboo Yusoof, on whom be peace, have held that the same is to be reckoned from the time of the marriage: and Mahomed, on whom

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be peace, has held that the six months are to be reckoned from the time of the intercourse: and *Fatwa* is given according to this view (of Mahomed).

And in the case of a valid (*Saheeh*) marriage, there is a concurrence of authority that the period (of six months) is to be reckoned from the time of the marriage: and some of the lawyers have held that intercourse is not a condition (in the establishment of descent) in case of a valid (*Saheeh*) marriage, but meeting (or *Khilwut* of the husband and wife) is absolutely necessary (so that according to those lawyers, if a child is born on the date the six months expire, from the time of the marriage, which is followed by a meeting, or *Khilwut*, at any time before birth, descent is established in the husband).

1243. (343.) A man commits whoredom (or *Zina*) with a woman, and she then becomes pregnant by him: then, when the pregnancy becomes apparent, the man who committed whoredom (*Zanee*) marries her, and he (after marriage) has no (further) intercourse with her until she gives birth to a child: they (the learned) have said, if she was not (at the time of the marriage) in the *Iddut* of another man, the marriage will be valid, and penitence is obligatory on them: and the lawyer Aboo Lais, on whom be peace, says, if she gives birth to the child at six months (that is, exactly after six months reckoned) from the date of marriage or more (than six months), the marriage shall be valid, and the descent (or *Nusub*) shall be established; but if she gives birth to the child in less than six months from the date of the marriage, the descent, or *Nusub*, shall not be established, and the child shall not inherit from the man, except in a case where the man says, "this child is from me (born of me)," and does not say (that is, does not further add) "on account of whoredom or *Zina*."

1244. (344.) A man is accused (by people) with a woman, whose pregnancy is in an apparent condition (at the time of the accusation): then, the woman's father gives her in marriage to him, and the husband denies that the pregnancy was by him, the marriage shall be valid, according to Aboo Haneefa and Mahomed, on whom be peace; because, according to them, the marriage of one, who is pregnant by whoredom, is valid (either with the man who committed the *Zina* or with somebody else); but it shall not be lawful to the husband to have carnal intercourse with her until she is delivered of her pregnancy (because he has denied the *Zina*, and the pregnancy was, therefore, by somebody else: but if the *Zanee* himself marries the woman, then the marriage is valid, and he is also authorised to have intercourse with the woman).

1245. (345.) A man marries a woman (with whom he had committed no *Zina* and she had a husband before); she then gives birth to a fœtus, whose figure is either fully formed or partially formed: they (the learned), have said, that if she gives birth at four months (that is, exactly on the last hour of four months after the marriage), the marriage is valid; but if she gives birth (to the fœtus) at four months less by one day, then the marriage shall not be valid; because the figure is not formed in less than one hundred and twenty days (or four months): therefore when she has abortion (in less than four months) of a fœtus whose figure is formed, the fœtus was (*i.e.*, must have been) by a husband who existed before this husband; therefore the marriage is not valid (because only a woman who is pregnant by *Zina* can validly marry; but a married woman who is pregnant cannot marry except after the expiry of the *Iddut*): and if she gives birth (in the same case) to a full (grown) child, then, if she gives birth at six months (that is, exactly on the last day of six months) from the date of the marriage, the descent shall be established from him (the man) and the marriage shall be valid; but if she gives birth in less than six months, her marriage shall not be valid (because it must be supposed that at the time of her marriage she was pregnant by a former husband; and the descent also shall not be established from him).

1246. (346.) In the case of a full-grown child, the months are reckoned with reference to the moon (and the reckoning is not to be by the number of days).

And if the marriage takes place on the tenth of a month, she shall have to reckon twenty days of this month and five lunar months, and ten days out of the sixth month (although by this reckoning, she might not get one hundred and eighty days).

And, similarly (reckoning is to be made) in (case of) the *Iddut* of an *Aysa* woman (that is, one who has reached the age when her monthly course has stopped: her *Iddut* is three lunar months, reckoned in the above manner).

1247. (347.) A man disappears from his wife, who is a (*bakira* or) virgin (the husband not having had intercourse with her), or is (a *Syeeba*, that is) one who has had intercourse with a man (that is, the husband has had intercourse with her): the wife marries another husband, and gives birth every year to a child: Aboo Haneefa, on whom be peace, says, the children shall belong to the first husband (that is, the *Nusub* shall be

established as from him, although he is not present), and it is valid for the second husband to give *Zakat* to the children (which he could not do if the children were his), and it is valid for the children to give evidence in his favor (which they could not do if they were his children). And it is not valid for a whoremonger (*Zanee*) to give *Zakat* to his children by adultery; (therefore, in the case above given, the children are not by *Zina* or adultery.)

And it is reported from Aboo Haneefa, on whom be peace, that he (subsequently) took a different view, and held that the children shall not belong to the first husband, and that they shall belong only to the second husband, and the *Fatwa* is given according to this view.

1248. (348.) And it is not valid for a husband to give *Zakat* to the child by his wife, who is a *Moolaina* (*i.e.*, a wife accused of *Zina* and separated) and the child's evidence in his favor shall not be accepted. But *Hesham* has said in the Nuwader that the evidence of the child by a *Moolaina* wife in favor of the husband is valid.

1249. (349.) A man marries a woman, and she gives birth to a child at five months (that is, on the expiry of the last day of the five months from the time of the marriage; the meaning here is, that she gives birth in less than six months after marriage): then the husband says, "The child is my child, for a reason which renders it obligatory that the child shall be mine (*e.g.*, concealed marriage);" but the woman says, "No, (the child is not yours) but (on the other hand) the child is by whoredom (*Zina*);" according to one tradition (from Aboo Haneefa), the word to be accepted is that of the man, and according to another tradition, the word to be accepted is that of the woman.

But if she gives birth to the child at (or after) more than two years from the time of the marriage, then the case being the same, the word to be accepted is that of the husband; and also, according to the tradition of Hussun (from Aboo Haneefa), the woman's word should be accepted.

1250. (350.) A male slave marries a female slave by the permission of their masters: then a man purchases them, and the purchaser claims that those two (the male and female slaves) are his (own) children, and (they are, as regards age, such that) like them could be born to one like the purchaser; then both of them shall be his children (provided that their descent is not known) and the marriage between them shall be invalid, although they might deny this (that they are his children).

1251. (351.) And it is reported from Mahomed, on whom be peace, that if a man purchases a female slave, who gives birth by him (the man): then another man comes and establishes proof (*byyuna*), that she is his wife, who had been given in marriage to him by her master: he (Mahomed), says, "I will hold her to be his (the second man's) wife, and hold the child to be the child of the husband (the second man); because he is the owner of the *Firash* (the bed), but the child shall be free as against the master, on account of his (the master's) claim that the child is his (own)."

1252. (352.) A man marries a woman (who was formerly the wife of another man and validly separated from him), and she then gives birth to a full-grown child in less than six months (from the time of the marriage): Mahomed, on whom be peace, says, "the marriage is invalid (*fasid*), according to my view and that of Aboo Yusoof, on whom be peace." (Compare paragraph 345).

1253. (353.) A (*Mujboob*) man, whose male organ is cut off, marries a woman who remains with him for a (long) time; she then gives birth to a child: Aboo Yusoof, on whom be peace, says, the child shall belong to him (the man aforesaid), and this child shall render her lawful to the husband whom she (might have) had before, and who (might have) divorced her thrice.

1254. (354.) A man marries a woman, and afterwards divorces her before intercourse, and marries her daughter: the mother (the woman whom the man first married) then gives birth to a child in less than six months from the time of the divorce, and the man denies (the paternity of) the child: Aboo Yusoof, on whom be peace, says, his wife (that is, the daughter), shall become (*bain*, or) separate from him (because the birth within six months is evidence of pregnancy at the time of the divorce: there was, therefore, intercourse with the mother, and the marriage with the daughter must therefore be void); and it is valid for him to marry the mother after this (provided that intercourse is not found with the daughter, otherwise there would be *Zina* with the daughter, and *Hoormut-i-Moosahrat* would be established): and his belief that the marriage with the daughter was valid does not prevent him from marrying the mother (because the marriage with the daughter was void *ab initio*,—there having been intercourse with the mother; but if the marriage with the daughter had been valid, then the mere marriage with her renders her mother unlawful to him. See paragraph 280.)

1255. (355.) A woman receives intt the marriage: the child shall husband; and she (accordingly) observes'ie Hanifites), Zoofur, on whom ries a husband and gives birth to a child; But if she gives birth to the back alive: Aboo Haneefa, on whom be peace six months, from such time that the child shall belong to the first husband long to the husband (because from this view, and said, that the child shall b and in case of birth after (because his is the real *Firash*, and *Nikah* is a.ge, it may be that the in-

1256. (356.) A man divorces his wife eith divorced, or it may be that reversible divorce: the wife then marries during; and in case of birth with- expiry of the *Iddut*, it cannot be known with ce before the marriage, and in pregnant by the first husband) she gives birth to h month, from the date of divorce by the first husband, and at six months or ery moment of marriage, with the second husband: Aboo Yusoof, on whom k place instantaneously shall belong to the first husband, (contrary to iarriage was completed, paragraph 355): because if we assign the child to the hurah Vikaya, Vol. II, present case), we shall necessarily hold that the *Idd*bound to observe the of the first husband had expired (before the second marriage), and this we cannot do (because the case supposes that the second marriage took place before the expiry of the *Iddut* of the first marriage).

This case is similar to that of an *Oomm-i-Wulud* (a female slave who has borne a child to her master), whom her master has given her freedom, or whose master has died: and she is consequently (in both cases) obliged to observe the *Iddut*; but she, during the *Iddut*, marries and gives birth to a child at two years from the time of the death of her master, or from the time her master gave her her freedom, and at six months from the time she marries: then all of them (that is, the master and the husband in one case, and the master's heirs and the husband in the other case) claim the child: the child shall belong to the master, according to the view of all (the learned lawyers) by reason of the *Iddut* being in existence (that is, by reason of the marriage taking place during the *Iddut*).

But contrary to it (that is, the first case) is the case of an *Oomm-i-Wulud*, who marries without the permission of her master, and gives birth to a child at six months or more from the time of the marriage; the master and the husband then claim the child: the child shall belong to the husband, according to all (the learned lawyers; because there was no *Iddut* here).

1257. (357.) If the husband divorces his wife by way of reversible

(that is, in the event of her gi another man during the *Iddut,* and then accepted (that is, the conception, and she gives birth to a child at two years her admission regarding the ex ivorce, and at six months or more from the that she was not pregnant, m l belong to the second husband; because if of the child shall be establis st husband, we shall necessarily be holding

1261. (361.) A man g le *Rujat* (or took her back, and we cannot as- ation received from the wife se does not assume it, and because the first of the maintenance during at; but if he claims *Rujat,* and proves it, the upon him: then the woman

ing, "I am in my monthly an has been divorced by her husband thrice, then admits within two woman whose monthly course has ceased): she which is a period of thre gives information (that is, expresses herself before band," and makes this a t, which was reckoned with reference to months, that the *Iddut* had expi gives birth to a child at more than two years (from by him): her claim (tha soof, on whom be peace, says, her *Iddut* shall expire cepted (provided she child; and the child shall not belong to the husband except when he claims the child. (The *Iddut* of an *Ayisa* woman is three months from the divorce: that of a pregnant woman is the time of her delivery: the longest period of gestation is two years from conception: the birth of the child must in this case be supposed to have taken place within two years and three months from the divorce, and then conception must have taken place within the three months; and, therefore, her *Iddut* is the time of her delivery. See *post* paragraph 1949. Further, if the birth takes place within two years from the divorce, the *Nusub* of the child must be referred to the husband, whether he claims the child or not: if the birth takes place within two years and three months from the divorce, the *Nusub* of the child would be referred to the husband provided he claims the child; because it would then appear that, although the conception did not exist before the time of the divorce, still it did take place within three months, which was the *Iddut* of the *Ayisa* woman. But if the birth takes place after two years and three months, then the *Nusub* can, by no possibility, be referred to the husband; because it would then appear that conception took place after the three months, which was the period of her *Iddut.* In case of the death of the husband, the birth must take place within two years, in order that the *Nusub* should be referred to the husband).

1259. (359.) A man marries a woman and then divorces her at the the very time of the marriage, and she gives birth to a child at the ex-

piry of full six months from the time of
belong to the husband, according to us (th
be peace, having taken a different view.
child at more than six months, or at less than
(*i.e.*, the time of marriage), the child shall not be
the lowest period of gestation is six months,
more than six months from the time of marria
tercourse took place after the wife had been
the woman has had intercourse with another man
in six months, it is clear that the conception was l
case of birth exactly on the last day of the sixt
marriage, in a case where the divorce was at the v
the law raises a presumption that the conception too
with the last words by which the contract of n
and the divorce followed such conception. See S.
p. 98. In case of the death of the husband, the wife is
Iddut, whether the husband has had intercourse with her or not. In case of divorce, the wife is bound to observe the *Iddut* only if the husband has had intercourse with her; not otherwise. In case of a woman, who is bound to observe the *Iddut*, the *Nusub* will be established, unless it is absolutely certain that the child was not procreated by the husband. In case of a woman, who is not bound to observe the *Iddut*, the rule is just the reverse, and *Nusub* will not be established unless it is certain that the child was procreated by him. Therefore, in the case in paragraph 358, *Nusub* is established if the child is born within two years and three months from the date of the divorce; but in the case in paragraph 359, *Nusub* is only established if the child is born at six months from the date of marriage, which is co-eval with divorce. See Vol. I, Futawai Alumgiree, pp. 723 and 724.)

1260. (360.) A woman says, during the *Iddut* for the death (of her husband), "I am not pregnant," and then says (during that *Iddut*) the day after, "I am pregnant;" her (latter) word shall be accepted (and her *Iddut*, which, in the event of her not being pregnant, would have been four months and ten days, will now extend to the period of delivery). But if she says after four months and ten days (which is the period of the *Iddut* for death) "I am not pregnant," and then says, "I am pregnant," then her (latter) word shall not be accepted (to establish her conception from the husband) except when she gives birth to the child at less than six months from the date of the death of her husband, and then

(that is, in the event of her giving birth as aforesaid) her word shall be accepted (that is, the conception shall be regarded as from the husband) and her admission regarding the expiry of the *Iddut* (involved in her expression that she was not pregnant, made as above) shall be void (and the parentage of the child shall be established in her husband).

1261. (361.) A man gives *Khoola* (a form of divorce for consideration received from the wife), to his wife in consideration of her dower and of the maintenance during her *Iddut,* and of every right which she has upon him: then the woman, at the time of the *Khoola,* makes admission, saying, "I am in my monthly course, and not pregnant from my husband:" she then admits within two months (which might be the *Iddut* for divorce, which is a period of three courses) saying "I am pregnant from my husband," and makes this admission, (even) before having made an admission that the *Iddut* had expired; and the husband denies the pregnancy (as by him): her claim (that she was pregnant by her husband) shall not be accepted (provided she does not give birth within six months from the *Khoola*).

1262. (362.) A man has a female slave, who is not of a moral character (*i.e.,* not a *Moohsina*) and is in the habit of going to and fro (the house of her master) and her master makes *Azul* with her (*i.e.,* he emits outside); she gives birth to a child, and the master is greatly inclined to believe that the child is not by him: the master is at liberty to deny the child; but if the female slave is of a moral character (*Moohsina*), he is not at liberty to deny the child; because it frequently happens that in case of (*Azul*) emission outside, the sperm falls on the outside of the private part, and then finds its way inside; therefore *(Azul)* emission outside cannot be relied on.

1263. (363.) A female slave runs away from her master for one day; the master then finds her out, and has intercourse with her, and emits outside (*Azul*), she then appears to be in a condition of pregnancy, and gives birth, *after* six months from the time she ran away, and the child dies: then if the female slave had run away with one with whom she was accused, the master shall be at liberty to sell her (and she shall not be considered an *Oomm-i-Wulud*); but if the female slave is of a moral character, so that no depravity had appeared in her, it is not proper for him to sell her, but it is proper for him to make an admission and call upon witnesses to attest that she is his *Oomm-i-Wulud,* so that she might not be sold after his death;

because it is most likely that the child is from him, and, therefore, in honesty he is bound to do this (to admit the child, and the position of the slave-girl as *Oomm-i-Wulud*) without relying on the (*Azul*) emission outside.

1264. (364.) A man gives his female slave in marriage to a suckling babe: she then gives birth to a child: the master claims the child, saying, "Verily, the child is from him" (the master): the parentage shall be established (in the master); because the master admitted the parentage of one of whom he became the owner (because what the slave-girl, though married, produces belongs to the master) and whose parentage is not known (because the husband being a suckling babe, he could not be the father, and no other is known to be the father): and if the husband of the female slave is (*Mujboob*) one whose male organ has been cut off, the parentage shall not be established in the master, because the child's parentage is established in the husband; and the husband shall be liable to the whole of the dower, on account of the existence of a constructive intercourse.

1265. (365.) A man divorces his wife by way of reversible divorce; she then gives birth to a child in less than two years by one day (from divorce): the man denies the child: she then gives birth to another child after more than two years by one day (after the said divorce, so that the second birth was on the third day after the first delivery, that is to say, twins are born, not on the same day, but after an interval of three days from the birth of each other), the children are his children, and the (*Rajut*), revocation (of the divorce) shall be established, because the children are twins, created by the same sperm; and the second child is born of conception which took place (*i.e.*, must have taken place), after the divorce (because the birth took place more than two years after the divorce), and the first child, therefore, must also have been so conceived, and intercourse after divorce is revocation (because twins are conceived at one and the same time: and twins are children born within six months of each other, so these two children were twins: and the longest period of gestation is two years, so the birth of the second child shews that its conception was at most one day after the divorce, and that must have been the time of the conception of the first child: and, therefore, revocation is established; but if there had been an only child born within two years, as in the case supposed, or if both had been born within two years, then, inasmuch as the birth took place within two years from the divorce, there would have been no revocation of the divorce, because the inference would then have been that the conception took place before divorce).

1266. (366.) A man after intercourse with his wife gives her irreversible divorce: then before the expiry of two years (from the divorce), the head of the child comes out, and after the expiry of the two years (from the divorce), the rest of the body comes out: the child shall not belong to the husband unless the major portion of the body of the child comes out before two years (that is, a minute or two before two years, so that the birth might be said to be exactly at two years).

1267. (367.) A man marries a female minor (*i.e.*, an infant girl) such that with one similar to her sexual intercourse could be had; she has no menses; the husband has intercourse with her; and he then gives her divorce by way of reversible divorce; then she says, after one month, (from the divorce), "*I am pregnant:*" then it *must be seen whether she* gives birth to the child in less than two years from the time of the divorce, *or in more than two years from the date of the divorce, or in less* than six months from the time she said "I am pregnant;" (in all these cases) the child shall belong to the husband: (if she gives birth to the child within two years from the date of the divorce, the case is clear: if she gives birth after two years, then the child shall belong to the husband only if the birth takes place within two years and three months, because three months constitute the period of the *Iddut* of one who has no menses, whether on account of minority or old age; and if intercourse takes place within the *Iddut*, the child shall belong to the husband; if the birth takes place within six months from the date of the marriage, then the child shall not belong to the husband; because the conception in that case must have taken place before marriage: if birth takes place within six months from the time she declared herself pregnant, then the child shall belong to the husband if the birth takes place at six months from the marriage, or within two years and three months from the marriage).

CHAPTER III.

ON THE DISCUSSION OF CASES RELATING TO DOWER.

1268. (368.) Nothing can be (assigned as) dower but what is (*Mal Mootkuwim*) property which possesses value (according to law). Therefore, if property of which the species is unknown is fixed (as dower), as for instance, when a man marries a woman, for "an animal" or "cloth," then the woman is entitled to the proper dower, whatever might be the amount of such proper dower; because (in such a case), the dower fixed is not valid (and the dower fixed will be taken to mean as if it had not at all been fixed).

And in the same way (the proper dower will be due) if he marries her for "a house (or enclosure)," without stating the position of the house (or enclosure).

And if a man marries a woman for a slave (without specifying which) or for a cloth of Herat, the dower fixed is valid (because the species is known), and she is entitled to the thing of a medium or average quality, and the proper dower shall not be due, and the husband shall be entitled, if he chooses, to give her the thing of a medium or average quality; or if he chooses, he might give her the value of the medium (or average) thing.

And if he marries her for a (*Koorr*), measure of wheat without giving the description of the wheat(whether of the first, or the lowest, or the medium quality), he shall have the option, if he chooses, to give her the average class of wheat so measured, or if he chooses he may pay her the price of that average class of wheat. And Hussun reports from Aboo Haneefa, on whom be peace, that it is obligatory on him to give the average class of wheat itself (not its price, because what was agreed upon is wheat). And if he describes the class of wheat so measured, saying, "of the average class," or "of bad description," he shall be bound to surrender the measure of wheat (itself, and he shall have no option to pay its price, without any difference of opinion).

And if he marries her for a cloth of a given description, the husband shall have the option, according to the Zahir-ool-Ruwayet, if he pleases, to give her the cloth of the said description (or kind), or if it pleases him, he may pay her the price thereof.

1269. (369.) And if the husband marries her for five dirhems, she shall be entitled to have the dower completed to ten dirhems; and no increase shall be made (over the ten dirhems) although her proper dower might be more than ten dirhems.

And if he marries her for his share in a certain house (*dar*), then Aboo Haneefa, on whom be peace, says, she shall have the option, if it pleases her, to take the share (in the house), or if it pleases her, she might take her proper dower to an amount not in excess of the value of (his share in) the house, although her proper dower might be in excess of such value; and according to his two disciples, on whom be peace, she shall be entitled to the share in the house, if the share in the house is equal (in value) to ten dirhems; (or even if the share is greater in value than ten dirhems: that is to say, if the share is in value equal to, or more than, ten dirhems, she shall get the share; but if the share is in value less than ten dirhems, then she shall get the share plus the deficiency in the ten dirhems, so that the ten dirhems should be completed; because dower cannot be less than ten dirhems).

1270. (370.) A man marries a woman for cloth, of which the price is eight (dirhems): she shall be entitled to the cloth and two dirhems: and if she does not take possession of the cloth, until the price thereof rises to ten dirhems, she shall be entitled to the cloth, and two dirhems, regard being had to the price of the cloth at the time of the contract of marriage.

1271. (371.) And if a man marries a woman for (*tibr*) silver, not reduced to the form of coin, weighing ten dirhems, and the value of the said silver is not equal to ten silver (current) coins, she shall be entitled to the former, and shall not be entitled to the increase. But in case of theft, of the like of it (*i.e.*, in case of theft of uncoined silver weighing ten dirhems) the hand of the thief, shall not be cut off as long as the value thereof is not ten dirhems in coin, and in this case (*i.e.*, of theft) regard is had (at the time of the theft) both to the weight and value by way of excuse (*i.e.*, mitigation) for not enforcing the punishment (or to give the prisoner the benefit of the doubt: his liability to punishment only arises in case of theft of property where the property amounts in value to ten dirhems, because the value of a limb is ten dirhems). And according to Aboo Yusoof, on whom be peace, the hand shall be cut off in case of theft of ten dirhems, even if the dirhems contain less of alloy or more of alloy, when those dirhems are such as are current among mankind.

And in case of *Zakat* (where a fortieth part is prescribed as the amount)

for two hundred dirhems (even) containing alloy, five of them shall be payable.

1272. (372.) And if a man marries a woman for a thousand dirhems current in the city (where the marriage took place): but before the woman takes possession of the dower, those dirhems go out of use (*Kusudut*) and other sorts of dirhems come into currency: the learned lawyers have said, if those dirhems (in reference to which the dower was fixed) are such that in case they are to be had they still circulate (or are used, though at a discount) then the woman shall be entitled to those dirhems and not to other dirhems, although their value has diminished in reference to gold.

But if those dirhems have been cut off, and are no longer to be had, or if they are (to be had, but are) not in circulation among mankind, it is obligatory on the husband to pay the value of those particular dirhems just before they came into disuse.

And if the dirhems are stipulated as price (or *Sumun*) but before the vendor takes possession of the price, the dirhems go out of use, the sale shall become invalid (or *fasid*) according to Aboo Haneefa, on whom be peace.

And it is for this reason that in our times the learned lawyers have adopted, (the rule) that in dowers, the description of deenars and dirhems should be mentioned.

1273. (373.) A man marries a woman for "the value of this slave or for the value of this house," the marriage shall be valid for her proper dower, because he fixed (for dower) a thing unknown (that is, of unknown *jins*, or kind).

1274. (374.) A man marries a woman for a thousand dirhems which so and so owes him: the marriage is valid, and she has the option, if it pleases her, to make the husband liable for the thousand, or if it pleases her, she might follow the debtor and insist on the husband appointing her as his Vakeel to take possession (or realise) the debt from the debtor.

And if he marries her on condition of his releasing so and so, who owes him a debt, then the so and so will be released, and she shall be entitled to her proper dower against the husband (because the release of another individual does not amount to property; so that the case will be taken as if dower was not mentioned, and therefore, she will get her proper dower; but if she herself was released from a debt, then that would be dower, and she will not be entitled to her proper dower in addition).

And if he marries her for a thousand, which is owing to him from so and so, payable at one year, and she consents to this, and he marries her for this, she shall have the option, if it pleases her, to make the husband liable for the property (the thousand) or if it pleases her, she might make the debtor liable: and if she elects to make the husband liable, she shall make him liable for the property (the thousand) at one year.

1275. (375.) And if a man marries a woman for "these ten pieces of cloth," but it turns out that the pieces of cloth are nine in number: Mahomed, on whom be peace, says, she is entitled to the nine pieces, and (also) to have her proper dower completed, if her proper dower is greater than the price of the nine pieces: and by analogy, from what Aboo Haneefa has said, she is entitled to the nine pieces, not more, in case the price of the nine pieces is ten dirhems.

But if the pieces turn out eleven in number, then Mahomed, on whom be peace, has said, that the husband shall give her ten of them, whichever ten he likes: and by analogy, from what Aboo Haneefa, on whom be peace, has said, if, after assorting the pieces, and separating the worst piece, and keeping ten of them, her proper dower is equivalent to those ten of them, then the worst piece shall be kept apart, and she shall be entitled to the (ten) pieces (so selected and being) other than the (one) kept apart; and if after selecting the best piece and separating it from the other ten, her dower is equivalent to the ten pieces so left, then the best piece shall be kept apart, and she shall be entitled to those ten pieces and not more; and if after separating the best piece, the ten pieces that remain are such that her proper dower is more than the value of those ten pieces, or if after separating the worst piece, the ten pieces that remain are such that her proper dower is less than the value of those ten pieces, then she shall be entitled to her proper dower; so that this case is similar to the case of a man who marries a woman for "this slave, or that slave," one of the two slaves being of very small value, and the other of very high value (in which case the wife is entitled to her proper dower). And *futwa* is given according to the view of Aboo Haneefa, on whom be peace.

1276. (376.) A man marries a woman for a certain quantity of wheat (*e.g.*, for the quantity of wheat before them) with the stipulation that the wheat amounts to ten measures (*Koorr*): but the quantity of wheat is found to be nine measures (*Koorr*); she shall be entitled to the nine measures, and a further measure of wheat similar (in quality) to the nine measures.

And if a man marries a woman for land (*Karah*) with the stipulation that the land is ten chains (one chain being equal to one hundred and forty-four yards), but the land is found to be five chains, then she will have the option, if it pleases her, to take the land as it is, if it pleases her, she may take the price of ten chains (of land) similar (in point of value) to that land.

1277. (377.) A man says to a woman "Give thyself in marriage to me for four thousand dirhems, on condition that thou shall give to my father one thousand, and to my mother one thousand," and the woman accepts this, then, whether her proper dower is less or more than (two thousand), the marriage is valid for two thousand, when, what is given up by the woman is for a person named (by the husband) and the marriage (in that case) shall be contracted for the balance.

1278. (378.) And if a man marries a woman for four hundred *deenars* on condition that he will give her in lieu thereof four particular (named) slaves: then this marriage is valid.

And so also, if a man marries a woman for (the consideration of) four slaves, which he shall give her, each of the slaves being of the value of one hundred *deenars*; or if he marries her for four hundred *deenars*, on condition that he shall give her "this" female slave in lieu of one hundred *deenars*, and (also) "this" house in lieu of one hundred *deenars*, and (also) on condition that he should be released from one hundred *deenars* and (also) on condition that one hundred *deenars* shall be due from him: this condition shall be valid.

And so also if he marries her for four hundred *deenars* on condition that he shall give her in lieu of each of the hundred *deenars*, a slave, the condition shall be valid, and she shall be entitled to get four slaves of average value.

And so also if he marries her for one hundred dirhems on condition that he shall bring for her in lieu thereof ten camels of average value, this will be valid by way of anology: but the *Kyas* was contrary to the validity of the same.

Mahomed, on whom be peace, says, "I allow in the matter of marriage what I do not allow in cases of sale."

1279. (379.) And if a man marries a woman for the consideration of the divorce of his other wife or for the consideration of (his right in consequence of) intentional blood (wilful murder) which is owing from him to her or to her guardian, or for the consideration that he shall teach

her the *Quran;* or for the consideration that he shall take her on a pilgrimage to Mecca: then she shall be entitled to her proper dower (because all this is not property. See Fatawai Alumgiree, Vol. I, p. 426).

And if he marries her for a (*Hujja*) earring, she shall be entitled to the price of an average earring.

1280. (380.) And if a man marries a woman, the former being a free man, on consideration of his serving her for one year, then she shall be entitled to her proper dower, according to Aboo Haneefa, and Aboo Yusoof, on whom be peace, (because a contract of service by a free man is not property).

And so also (the proper dower will be payable) if he marries her for the consideration of his tending her flock of (*ghunam*) goats or sheep for one year, or of his cultivating her land for one year, according to the tradition reported in the Asul.

And if he marries her on consideration of another free man serving her for a year, the other free man consenting to this, she shall be entitled to the service itself.

1281. (381.) And if a man says, "I have given in marriage to thee, this my daughter, on condition of thy giving in marriage to me thy daughter so and so," the marriage shall (*i.e.*, both marriages shall) be valid, and each of the wives shall be entitled to her proper dower (because dower is not mentioned, and the stipulation is not property: this is called the case of Shighar).

1282. (382.) And so also if a man marries a woman for a piece of cloth equivalent to fifty dirhems, she shall be entitled to the proper dower (because the cloth was unknown and was not determined).

1283. (383.) And if a man marries a woman for "this" slave, but the slave turns out to be a free man; or for "this" jar of vinegar, but the same turns out to be wine; or for "this" goat which is really a pig; or for "this" goat slaughtered (according to law), which is really a carcass; she shall be entitled to her proper dower.

And if he says, "I marry thee for this free man," but the man (supposed to be free) turns out to be a slave; or "for this pig" which turns out to be a goat; or "for this carcass of a goat" which turns out to have been slaughtered (according to law); or "for this wine" which turns out to be vinegar; then (in such cases) Mahomed has reported from Aboo Haneefa, on whom be peace, that she shall be entitled to her proper

dower : and Aboo Yusoof, on whom be peace, has reported gether, whether neefa), that she shall be entitled to what was pointed ou rcourse or not), the correct view. g to her, shall

1284. (384.) And if the husband has mixed up what n shall remain what is not property, saying, "I have married thee for the and one of them is found to be a free man, or "for these two jayer of) a female and one of them turns out to be wine; then in the *Zahir-ool* ders the female reported from Aboo Haneefa, on whom be peace, that she slave before the to what is property, if the same is equivalent to ten dirh r is void (*batil*); not equivalent to ten dirhems, then the ten dirhems shal course with her, just as if he had (only) mentioned what is property and not rriage no portion

1285. (385.) And if the husband (at the time of th intercourse, she fixing the dower) points out towards two properties, and says, "I have married thee for this slave, or for this slave" (using the disjunctive and referring to both the slaves), one of the two slaves being of the lowest (value according to the market) and the other being of the highest (value according to the market) : Aboo Haneefa, on whom be peace, says, if her proper dower is equivalent to the value of the slave of the lowest value, or less than the same, then she shall be entitled to the slave of the lowest value; but if her proper dower is equivalent to the value of the slave of the highest value, or more than the same, then she shall be entitled to the slave of the highest value; but if her proper dower is more than the value of the slave of the lowest value, and less than the value of the slave of the highest value, then she shall be entitled to her proper dower, which shall not exceed the value of the slave of the highest value and shall not be less than the value of the slave of the lowest value. And if he divorces her (in the same case) before having intercourse with her, she shall be entitled (as dower) to an amount equal to half of the value of the slave of the lowest value in all cases (that is, whatever be the proportion of her dower relatively to the value of the slaves), except when a moiety of the value of the slave of the lowest value, is less than her *Mootat*, in which case she shall get the *Mootat*; but Aboo Yusoof and Mahomed, on whom be peace, have held, that she shall be entitled to the value of the slave of the lowest value in all cases (including the case where Aboo Haneefa gives the *Mootat*) if the value of the slave of the lowest value is equivalent to ten dirhems or more than ten dirhems.

And the same difference of opinion exists if the husband marries a woman "for a thousand dirhems, or two thousand."

shall not take her wife emancipates the slave of the lowest value, before wife) and (there if her proper dower is equivalent to the value of the slave take her out of value, or less than the same, the emancipation by her of the thousand and rest value is valid (according to Aboo Haneefa): and if he takes her o the slave of the highest value; then if her proper dower titled to her the value of the slave of the highest value (or equivalent to shall not be less emancipation by her of the slave of the highest value is the dower shall her proper dower is less than the value of the slave of the

1290. (390.) hen emancipation by her of the slave of the highest value payable at present rding to Aboo Haneefa).

proper dower rea ation by her of the slave of the highest value after adopt whichever intercourse (that is, when divorce takes place before intercourse) is not valid in all cases (whether her proper dower is more or less than or equal to the value of such slave; because when dower is fixed in this way—"either this slave or that slave"—and their values are not equal, then, in the event of divorce taking place before intercourse, the learned have concurrently by *Ijma* hold, that her dower is half of the slave of the lowest value. See Fatawai Alumgiree, Vol. I, p. 437, line 8. That being so, she does not obtain any interest in the slave of the highest value, and, therefore, she cannot emancipate the slave of the highest value; but having a moiety interest in the slave of the lowest value, she can emancipate him): but the emancipation by her (in such a case) of the slave of the lowest value is valid (because she is the owner of half, as already said, and an owner of a fraction is entitled to emancipate the whole of a slave, and the owner of the other fraction is entitled to compensation, for which the slave must work), and this is the view of Aboo Haneefa, on whom be peace (that is, the invalidity of the emancipation of the slave of the highest value in one case and the validity thereof in the case of the slave of the lowest value). And Aboo Yusoof, on whom be peace, says, if she emancipates any one of them (either the slave of the highest value or that of the lowest value), before divorce or after divorce (whether there has been intercourse or not), the emancipation by her is void (because the dower being this slave or that slave, her right of property is not established in the one or the other).

And if the husband (in the above case) emancipates both the slaves together, the emancipation by him of them (according to Aboo Yusoof) is valid, and he shall give compensation for whichever of the two slaves he pleases (and if he emancipates one of the two slaves, the other slave will become the woman's dower).

And if the woman emancipates both of the slaves together, whether before the divorce or after it (whether there has been intercourse or not), then whichever of the two slaves shall ultimately belong to her, shall (according to Aboo Yusoof), be free (and the emancipation shall remain suspended in the meanwhile).

1286. (386.) And if a man marries a woman for (the dower of) a female slave, by way of an invalid (or *fasid*) marriage, and he surrenders the female slave to his wife: the wife then emancipates the female slave before the husband has intercourse with her: the emancipation by her is void (*batil*); but if she emancipates her after her husband has intercourse with her, then the emancipation is valid (because in an invalid marriage no portion of the dower is due before intercourse; therefore before intercourse, she obtains no interest in the slave, and emancipation by her has no effect; but if the husband has intercourse, then the dower becomes due, and the slave becomes her property, and she is at liberty to emancipate him).

1287. (387.) And if a man marries a woman "for one thousand, *and* on condition of his divorcing so and so," or "for one thousand, and on condition of the husband forgiving the intentional blood (or wilful murder) due to him from her," or "for one thousand, and on condition of his emancipating her brother;" then if the husband fulfils the condition, she shall be entitled to one thousand and nothing else: but if he does not fulfil the condition, then her proper dower shall be completed, if her proper dower is more than a thousand.

1288. (388.) And if a man marries a woman "for one of these two slaves, and whichever of them I like I shall give to thee," then the husband is entitled to give her whichever of the two he likes.

And if this takes place in *Khoola* (*e.g.*, where the woman says to the husband give me divorce for one of these two slaves, and I shall give thee whichever I like), then she shall be entitled to give him whichever (of the two slaves) she likes: and this is what Aboo Haneefa, on whom be peace, has laid down.

1289. (389.) And if he marries her "for one thousand, if he stays with her (undertaking to live with her in her own place and not to take her out of the town) and for two thousand, if he should take her out of her town," or "for one thousand, if he should have no other wife, and for two thousand if he has another wife": then Aboo Haneefa, on whom be peace, says, that the first condition is valid (that is, one thousand if he

shall not take her out of the town, or one thousand, if he has no other wife) and (therefore) if he carries out the (first) condition (that is, does not take her out of her town or has no other wife), she shall be entitled to one thousand and not more: but if the first condition is violated (that is, if he takes her out of town or if he has another wife) then she shall be entitled to her proper dower, which shall not exceed two thousand and shall not be less than one thousand (because the parties have agreed that the dower shall be between one thousand and two thousand).

1290. (390.) And if a man marries a woman "for one thousand payable at present, or for two thousand payable at one year:" then if her proper dower reaches the amount of two thousand dirhems, she shall adopt whichever course she likes (See Fatawai Alumgiree Vol. I, p. 434, section 3, on conditions in dower; this case is stated in the following terms:—If a man marries a woman "for one thousand payable at present or for two thousand payable at one year," then, according to Aboo Haneefa, if her proper dower is two thousand or more, then the woman has the option to accept one thousand at present, or two thousand after one year; but if her proper dower is less than one thousand, then the husband has the option to give her one thousand at present or two thousand after one year: and if her dower is more than one thousand but less than two thousand, then the woman shall be entitled to her proper dower: and if the husband divorces her before intercourse, then she shall, by *Ijma*, be entitled to a moiety of the lower amount).

1291. (391.) And if he marries her "for this leather bag (*Zik*, or *Mushuk*) of *Ghee* (clarified butter)," then if there is nothing in the leather bag, she shall be entitled to a similar leather bag of clarified butter, if the leather bag of clarified butter is equivalent to ten (dirhems).

And if he marries her "for the clarified butter contained in the leather bag," then if there is nothing in the leather bag, she shall be entitled to her proper dower; and so also (she shall be entitled to her proper dower) if there is in the leather bag something else of a kind different from clarified butter (because in the first case the dower was the leather bag with its contents, and in the second case the assumed contents of the leather bag formed the dower).

1292. (392.) And if a man marries a woman "for a female slave on condition that her service shall be for him as long as he lives" or (if he marries her for a female slave) "on condition that whatever is in her womb shall belong to him:" then the female slave (herself), and her ser-

vice, and whatever is in her womb shall appertain to the woman, if her proper dower is equivalent to the price of the female slave or more than such price; but if her proper dower is less than the price of the female slave, then she shall be entitled to her proper dower, except when the husband delivers the female slave to her of his own choice without service (that is, she shall not be entitled to her proper dower if the husband himself elects to surrender the female slave without condition of service for himself).

1293. (393.) And if a man marries a woman, for a (*ghunum*) goat (or sheep,) specifying the same, on condition that "the hair (or wool) of the goat shall belong to him;" then he shall be entitled to the hair by way of analogy (*Istihsan*; because goat implies the flesh and does not include the hair).

1294. (394.) And if a man marries a woman for one thousand on condition that he shall not inherit to her and she shall not inherit to him, the marriage shall be valid for the thousand (without regard whether her proper dower is less or more; and the condition regarding absence of inheritance shall be void).

1295. (395.) And if a man says to a woman, "I marry thee on condition that I shall give thee one thousand dirhems," or (if he marries her) "on condition that I shall give thee this, my slave," and he marries her on this condition (without mentioning the dower at the time of the actual marriage); then Aboo Yusoof, on whom be peace, says, if the husband gives her what is fixed (as dower) then the same shall be her dower: but if he refuses to surrender (what was mentioned before marriage as dower, *viz.*, the thousand in the one case, or the slave in the other), no compulsion shall be exercised over him, and he shall be liable to her proper dower (because when no dower was mentioned at the time of the marriage she shall be entitled to her proper dower and not to the thousand or the slave; because the thousand or the slave was not fixed as dower, and no increase shall be made over the thousand or over the price of the slave (even if her proper dower is more than the thousand or the price of the slave), and this is the view of Aboo Haneefa, on whom be peace.

1296. (396.) And if a man marries a woman for a slave, but the slave turns out to be a *Moodubbur*, or *Mookatub*, or an *Oomm-i-Wulud*, she shall be entitled to the price of the slave, whether she knew or not (at the time of the marriage) that the slave is such *Moodubbur*, or *Mookatub*, or *Oomm-i-Wulud*.

1297. (397.) A man owes a woman a thousand dirhems, being the *price* of things sold: he marries her for his delaying (the payment of) the same to her for one year: she shall be entitled to her proper dower, and the (promise to grant time or) delay is void.

1298. (398.) A man divorces his wife by way of a reversible divorce, and he then takes the woman back (revoking the divorce) and says to her, "I have made an increase in thy dower:" this increase shall not be valid, because the increment is unknown (*Mujhool*).

But if he says, "I have taken thee back for the dower of one thousand dirhems (that is, by increasing the dower by an amount of one thousand dirhems):" then if she accepts the increment it (*i.e.* the increase) is valid; if not, then not; because this is an increase in the dower and therefore it depends on her acceptance.

1299 (399.) And if a man marries a woman for one thousand dirhems, and he then renews the same marriage for two thousand dirhems: the learned lawyers have differed in this matter: Sheikh Ool Imam, known as Khahir Zada, on whom be peace, says, in (his work in) the book on Marriage that, according to Aboo Haneefa and Mahomed, on whom be peace, he shall not be liable for the second thousand, and her dower shall be one thousand dirhems (contracted in the first marriage), and that according to Aboo Yusoof, on whom be peace, he shall be liable to the second thousand (also): and some of the lawyers have put this difference (between Aboo Haneefa and Mahomed on the one hand and Aboo Yusoof on the other) in the contrary way; that is, that, according to the view of Aboo Haneefa and Mahomed, he shall be liable to the second thousand, and that, according to the view of Aboo Yusoof, on whom be peace, he shall not (be liable to the second thousand).

And Isamooddin, on whom be peace, has said that he shall be liable to two thousand, and he has not mentioned any difference of opinion.

And Shumshool Ayma Hulwayee, on whom be peace, has said in his work, entitled *Shuruhool Hyul*, where a husband renews the marriage with his wife, then it is reported from Aboo Haneefa, on whom be peace, that the second dower is obligatory upon him, and that this shall constitute an increase in the dower (that is, that the second marriage shall not amount to a second marriage, because the first one is in force, but the dower shall be held to have been increased by one thousand); and towards this rule Shumshool Ayma Surukhsy, on whom be peace, inclines in the *Shuruhool Nukah.*

Moulana (Kazee Khan, the author of this book) says, it is just that the second thousand should not be obligatory on the husband; because the said second thousand is not an increase by express words (that is, the husband has not in express words said that he increased the dower, but he renewed the marriage for two thousand, whilst the first marriage was in force), and if increase is established, it is only established by way of implication by virtue of the (second) marriage; and therefore, when the second marriage itself is not valid, then what is implied from the second marriage cannot be established.

And it is for this reason (because the second contract is not an increase upon the first contract), if a person sells a thing for a thousand and then again sells the same thing (to the same purchaser) for one thousand and five hundred, the second sale shall amount to avoidance (*fuskh*) of the first sale: and increase in purchase-money and increase in dower stand upon the same footing; therefore, if it was possible to hold the second marriage to be an increase, the second sale would also be considered as an increase, instead of being considered as avoidance of the first sale.

And for this reason (because the second marriage or second contract is not an increase), if the first marriage was for one thousand and the second marriage (also) for one thousand, the second property (*i.e.*, the second thousand) shall not be an increase in dower.

1300. (400.) A woman makes a gift of her dower to her husband: then the husband makes an admission (*Ikrar*) in the presence of witnesses, that he owes her so much on account of dower: the learned lawyers have entered into a discussion regarding this admission. The lawyer Aboo Leith, on whom be peace, has laid down that the husband's admission shall be binding on him, if the woman accepts the same, and his admission shall be referred to an increase on his part of her dower (and the husband shall be liable to the amount admitted and not to the dower originally fixed): and an increase in dower after gift of the dower is correct (valid); but it is necessary that there should be an acceptance on her part of the increase, because increase in the dower is not correct without acceptance by the woman.

1301. (401.) A man says to his wife, "If I make an admission regarding thy dower, then thou art divorced;" he then intends (makes up his mind) to make the admission, whilst in health; then the woman (in order to avoid the divorce) shall, after releasing him from her dower, sell something from her property (to the husband) for price corresponding to

the amount of which the husband intends to make an admission on account of her dower, and the husband shall then make an admission against himself in her favour regarding the purchase-money on account of the sale; the husband shall, in that way, be within his vow (*i.e.*, shall thus save his oath and not break it). But if the husband (instead of being in health) is sick (or *Mirreez* by way of *Murz-ool-mouth*), there is no device (*Heela*) for him in this matter.

1302. (402.) A man says to his wife, "Release to me thy dower, so that I may give thee something;" the wife thereupon releases the husband from her dower; the husband then refuses to give her anything: Nuseer, on whom be peace, says, the husband shall not be released from the dower.

1303. (403.) A man marries a woman for a thousand, on condition that every part of the thousand is deferred: then if the period (*ajul*) to which payment is deferred is known, then the deferring of the payment is valid; and if the period of payment is not known, the postponement of the time of payment is not valid: and when the postponement of the time of payment is not valid, then the husband shall be compelled to prompt payment of that amount, which the people of the particular place recognise as prompt, and the balance shall be realised from him after divorce or death, and the Kazee shall not compel the husband to deliver that balance, nor shall he imprison him for the same.

1304. (404.) And if a brother and a sister inherit a house from their father, and the brother then marries a woman for one particular room of the said house, and he then dies, and the sister does not consent to that room being assigned to the wife on account of her dower: the learned lawyers have held that the house shall be divided between the father's heirs, *viz.*, the brother and the sister; and if that particular room shall fall into the share of the brother, then the room shall belong to the woman on account of her dower; but if the said room falls into the share of the sister, then the price of the room shall be assigned to the woman out of the estate of her husband. As in the case of a man who marries a woman for a slave; then somebody else happens to establish his right to the slave whilst he is in the possession of the woman; she shall be entitled to look to the husband for the price of the slave.

And if (in the same case) the brother marries a woman for (some) property (*mal*); then the husband, in lieu of that property gives her a particular room from the said house, and the rest of the case is just as

aforestated: the sale (by the husband to the wife of the said room in lieu of dower) is void (*batil*), and the husband shall remain responsible for the dower for which he married her.

1305. (405.) A number of persons say to a man, "We have given thee in marriage to such and such a woman for one thousand dirhems on condition that hundred out of the same shall be thine;" and the woman consents to this: the marriage shall be valid for nine hundred and this (hundred) shall be considered as excepted (from the dower, that is, that the dower shall be taken to be one thousand minus one hundred).

1306. (406.) A man marries a woman by way of an invalid marriage for a particular female slave (*Khadima*); and before the husband has intercourse with her, she emancipates the female slave, the emancipation by her is void (*batil*); but if she emancipates her after the husband has had intercourse with the wife, then the emancipation by her is valid. (See paragraph 386).

1307. (407.) A man marries a woman for several pieces of cloth of a particular kind and quality, of which the length and breadth and number are stated, such pieces to be delivered at a stated time; and the husband then gives her the price of the pieces of cloth: it shall be open to her not to accept the price; but if the time for the delivery of the pieces of cloth has not been fixed, then she shall be entitled to refuse to accept the price.

Mahomed, on whom be peace, says, that the principle is this, that in whatever thing a *Sulum* sale is valid, she is competent not to take anything except the thing named, and in whatever thing a *Sulum* sale is not valid, it is open to the husband to give her the price: and *Sulum* sale in cases of cloths is valid when the period is named, and it is not valid when the period is not named, in which (latter) case it is competent to the husband to pay the price. But in cases where the thing (fixed as dower) is capable of being measured (by *Kyl*, which is a particular measure) or of being weighed (in which cases a *Sulum* sale is not valid when no date is fixed) it is (still) competent to her not to take the price, although the period might not be mentioned, because things capable of being measured (by *Kyl*), or weighed, are capable of being used in fixing dower or purchase-money without the period being named: but as regards the pieces of cloth aforesaid, although they are capable of being fixed as dower, still they derive certainty by being described (as regards

quality, in addition to length, breadth and pieces; whereas things weighed or measured derive such certainty without any particular description in addition to the description as regards the kind): and, therefore, pieces of cloth stand on the same footing as a slave (that is, as a slave may be of various qualities, so may a piece of cloth of a particular kind be of various qualities): and if a man marries a woman for a slave undefined (and undescribed) then it is competent to him to pay the price of the slave.

(A *Sulum* sale is where the purchase-money is at present paid and the thing is to be delivered afterwards: it is necessary for the validity of such a sale that the time of delivery of the thing sold should be definitely stated, and the property to be delivered should also be accurately described. The property sold might consist of cloth or grain: if the former, then the kind and quality, length and breadth and the number of pieces should be stated. When the dower fixed is a thing, with reference to which *Sulum* is valid, the husband shall surrender the very thing, and the woman is entitled to refuse the price. If, therefore, pieces of cloth, with full requisite description, are fixed as dower, and the time for delivery is also mentioned, then the pieces of cloth shall be surrendered, and the wife is entitled to refuse the price. If, therefore, things which are sold by being weighed or measured, are fixed as dower, then, if the time for delivery is not mentioned, their sale in the *Sulum* form is not valid; but still the wife is entitled to insist on the delivery of those things instead of accepting their price. If a thing is fixed as dower, in which *Sulum* is not valid, such, for instance, when the thing is susceptible of a *Sulum* sale but the time for delivery is not stated, or when the thing itself is not susceptible of *Sulum* sale, as a house or land, the husband is entitled to surrender the thing itself or pay the price, and the woman has no option of refusal. If cloth is fixed as dower, then the case is similar to where a slave is fixed as dower. Both must be described fully, and if fixed as dower, the husband must surrender the same, and the wife must accept it: if the description is deficient, then the husband must pay the price of the medium quality, and the woman must accept it, provided it is not below ten dirhems: if the price is below ten dirhems, then the ten dirhems must be completed).

1308. (408.) A man swears that he shall not marry a woman for four dirhems; he then marries a woman for four dirhems, but the Kazee completes the dower to ten dirhems: Mahomed, on whom be peace, says, that the man shall not be held to have forsworn himself (because the dower cannot be less than 10 dirhems): and so also, if he himself, after the marriage, increases the dower (from four to ten dirhems).

1309. (409.) A man says to a woman, "I have married thee for a thousand dirhems;" she says, "I have not given myself in marriage to thee," but she afterwards says, "I have given myself in marriage to thee," the marriage shall be valid (for a thousand dirhems): and so also if the wife keeps quiet and then they separate, and the woman then says, "thou didst say truthfully when thou didst say that 'I have given myself in marriage to thee for one thousand,'" the marriage shall be valid (for a thousand dirhems).

1310. (410.) A man says, "I have married this woman," she being his female slave and known as such: Mahomed, on whom be peace says, this shall not amount to an admission of her emancipation, and the marriage shall be void (that is, marriage with one's own female slave being unlawful, the words used will not have effect given to them and will not have a secondary or metaphorical sense).

1311. (411.) A man says to a woman, "I marry thee for a she camel out of these my camels:" Aboo Haneefa, on whom be peace, says, she shall be entitled to her proper dower (because the dower is not described and is *mujhool*): and Aboo Yusoof, on whom be peace, says, he shall, out of the camels belonging to him, give her a she camel such as he likes.

1312. (412.) A man marries a woman for a thousand, on condition that he will give her whatever cash (at present) it is easy for him to give and the rest at a year: the whole of the thousand shall be payable at a year except when the woman establishes proof (*byyuna*) that it is easy for him to pay her a part or the whole of it, in which case she shall (be entitled to) take that part or the whole.

1313. (413.) A man marries a woman for a room and a slave (both undescribed): Aboo Haneefa, on whom be peace, says, she shall be entitled to eighty dinars; forty on account of the price of the slave, and forty on account of the price of the room: and Aboo Yusoof and Mahomed, on whom be peace, say, that forty shall not be taken as the measure (or test of value) but regard shall be paid to the low or high ruling (or prevalent price), and *Futwa* is given according to their view.

1314. (414.) If a man marries a woman, and fixes a thing (for her dower) pointing out towards another thing, and the thing pointed out is not of the kind named (or fixed as dower): Aboo Haneefa, on whom be peace, says, if both of them (that is, both the thing fixed and the thing pointed out) are lawful things, then she shall be entitled to a thing similar to what

has been fixed; but if both of them are unlawful, or if the thing pointed out is unlawful, she shall be entitled to her proper dower (whatever the amount might be); but if the same (the thing pointed out) is ambiguous of which the lawfulness was not known at the time of the marriage—as if a man marries a woman for this jar of vinegar, which turns out to be wine—then she shall be entitled to a similar jar of vinegar, and if the jar (the thing pointed out) contains wine, then she shall be entitled to her proper dower; and if the thing named (as dower) is unlawful, and the thing pointed out is lawful, then there is a diversity of tradition from Aboo Haneefa, on whom be peace; but the correct tradition is that reported by Aboo Yusoof, on whom be peace, that if he pointed out towards a thing which is lawful, she shall be entitled to the thing pointed out.

1315. (415.) And if the man says, "I have married thee for the goat which is in this room": then if in that room there is a pig, or if there is nothing in that room, she shall be entitled to a goat of medium price (provided the price is not less than ten dirhems) and the sign (indication with the finger as aforesaid) shall be void (or come to nothing).

1316. (416.) A man gives his daughter in marriage and says, "Do ye bear witness that I have given so and so (naming his daughter) in marriage to so and so (naming the bridegroom) for two thousand dirhems on condition that (out of the two thousand), one thousand dirhems shall be payable by me from my property, and one thousand shall be payable by so and so—meaning thereby the husband;" the husband then says, "I have accepted this:" the husband shall be liable to her for the whole of the dower; and this will amount to suretyship on behalf of the father for one thousand dirhems, and, therefore, when the husband accepts this, he, in effect, authorises the father to stand surety for him (the husband); and when the woman realises the thousand from her father or from his (her father's) estate (after his death), it shall be competent to the father, or his heirs, to realise this from the husband.

But if he (the father) says, "Do ye bear witness that I have given my daughter, so and so, in marriage to so and so for a thousand dirhems out of my (own) property," and the husband says, "I have accepted:" the marriage shall be valid, and the father shall not be liable as surety (but the husband shall be liable for the whole of the dower, and the father shall not be liable at all, because dower must be husband's property).

1317. (417.) A man marries a woman for ten dirhems and a piece of

cloth, without describing the cloth: she shall be entitled to the ten dirhems; and if he divorces her without having intercourse with her, she shall be entitled to five dirhems, unless her *Mootat* is more than five dirhems, *in which case she shall be entitled to the Mootat.*

1318. (418.) A woman says, "I have given myself to thee in marriage for *two thousand dirhems, one thousand out of which I have given up* for God's sake, and out of regard to our kinship;" and the husband says, "I have accepted:" the dower will be one thousand dirhems.

1319. (419.) A man gives his daughter in marriage to another man on condition of the husband releasing the father (of the woman) from a debt, which the father owes to the husband; or if the daughter gives herself in marriage, on condition of the husband releasing her father from the husband's debt, which is so much; (the husband then does release the father from his debt): then this release by the husband is valid, and she shall be entitled to her proper dower; (because the debt was not constituted the dower, *and the marriage took place without* dower having been mentioned; the release was stipulated for by way of a condition).

And so also (she shall be entitled to her proper dower) if she says, "(I give myself in marriage to thee) on condition that thou shouldst release my father, and this (release) shall be my dower," (because right to release does not come within the definition of property).

1320. (420.) A man marries a woman for her slave (her own slave being fixed as dower): it is said in the Nuwadir that she shall be entitled to her proper dower: and this case is not at all analagous to where the man marries the woman for another man's slave; for in that case, if the owner of the slave permits (*that his slave should be given in dower*), the slave shall become the dower, and in the present case, the slave of the woman herself cannot become her dower.

1321. (421.) If a man marries a woman for a thousand, on condition that she should return him a thousand: the marriage is valid, and the wife shall be entitled to her proper dower, in the same way as if the husband marries her on condition that there shall be no dower for her (when the wife shall be entitled to her proper dower).

1322. (422.) And if a man marries a woman on condition that the husband shall give to the father of the woman a thousand dirhems: she shall be entitled to her proper dower, whether he gives to her father a thousand or not; but if he does give a thousand dirhems to her father, he

is entitled to retract the gift (and demand the thousand back from her father).

And if he marries a woman on condition that he shall give to her father, on her behalf, a thousand dirhems, then the thousand (dirhems) shall be her dower; and if he divorces her before intercourse, having already (before such divorce) paid the thousand to her father, he shall get a return from her of a moiety of the thousand, she being (in effect) the donor (of the thousand to her father).

1323. (423.) A man gives his slave in marriage to a woman for a thousand dirhems: he then, after the slave has had intercourse with his wife, sells the slave to her for nine hundred dirhems: the woman shall take (or deduct) the nine hundred dirhems on account of her dower, and the marriage shall be void, and the wife shall not be entitled to look to the slave for the payment of the remaining hundred, even if the slave should get his freedom; and if the slave owes to some other man a debt of one thousand dirhems, and the creditor gives the master permission to sell (for nine hundred) the slave to the woman (*i.e.*, the wife), then the nine hundred shall be divided between the creditor and the woman; and the nine hundred shall be applied (or distributed) between the creditor and the woman, each of them taking his or her portion out of the same in right of the thousand; and the woman shall not any further follow the slave (for the rest of her debt), but the creditor shall follow the slave for the rest of his debt, when the slave obtains his freedom.

1324. (424.) A man marries a woman for whatever (amount of dower) she shall order him: the marriage shall be valid, and it is competent to her to order (payment) to the extent of the proper dower, or less than that; and if she orders him (payment of) more than her proper dower, her order upon the husband shall not be valid until he consents to that order; and if (the marriage takes place with the stipulation that) the order is left for (or in the option of) the husband (that is, if the dower is whatever the husband shall direct), then his order to the extent of her proper dower, or more is valid; and if his order is for less than her proper dower, then his order shall not be valid unless with the consent of the woman, and (if she does not consent) she shall be entitled to her proper dower.

And so also if the husband and wife marry on condition that the dower shall be what a stranger shall order, and the stranger orders the dower to be to the amount of her proper dower, then his order shall be

valid; but if the stranger orders (that) the dower (shall consist of an amount) in excess of her proper dower, his order shall not be valid as against the husband (and she shall be entitled to her proper dower); and if he orders the dower to be less than her proper dower, then his order shall not be binding on her, and she shall be entitled to the proper dower.

1325. (425.) A man says to a woman, "I marry thee for dirhems" without mentioning the number (of the dirhems): she shall be entitled to her proper dower; but in case of *Khoola* (or divorce) this similarity will not hold good (that is to say, if a woman seeks *Khoola* from her husband in consideration of dirhems, in the plural, without mentioning the number, then the result will not be that she will have to pay her proper dower, but the result will be that she will have to pay the lowest number of dirhems which the plural number embraces, and that is three: if she says, I seek for *Khoola* for the dirhems in my hand, then if she has in her hands three or more dirhems, she will have to pay all the dirhems in her hand; and if she has less than three in her hand, she will have to complete three dirhems, because she used the plural number. See Futawai Alumgiree, Vol. I, pp. 675 and 676; and see also paragraph 1741 *post*).

1326. (426.) If a man marries a woman "for less than a thousand," and her proper dower is two thousand (that is, more than a thousand): she shall be entitled to one thousand dirhems; because the extent by which the dower is to be reduced from one thousand is not valid by reason of ambiguity (that is, the amount of reduction is ambiguous), and the case would stand as if he married her for one thousand; but if her proper dower is less than ten (dirhems), then Mahomed, on whom be peace, says, she shall be entitled to ten dirhems.

1327. (427.) A man marries a woman for a thousand, on condition that he shall not give her maintenance; and her proper dower is one hundred: she shall be entitled to the thousand and (also) to maintenance, (that is to say, the stipulated dower shall be paid on account of the contract, and the agreement not to maintain her shall be null and void).

1328. (428.) If a man marries a woman who is her kin (*Zee Ruhum*) and is also unlawful to him, for instance, his mother, or daughter, or sister, or father's sister, or mother's sister, or if he marries his father's wife or his son's wife (who are not of his kin, but are unlawful to him), and has intercourse with her: then, according to Aboo Haneefa, on whom be peace, he shall not be liable to punishment, but he shall be liable for her proper

dower, whatever might be the amount thereof; and Aboo Yusoof, and Mahomed and Shafei, on whom be peace, have said, if the husband knows that the women are of his kin, who are forbidden to him (that is to say, if a man is about to marry a woman who is his mother then, if he knows that he is marrying his mother, and also knows that to marry the mother is against the law), he shall be liable to punishment but he shall not be liable to dower; but if he does not know this (that is, if he is not aware that the woman he is marrying is his mother, or knows that she is his mother, but does not know that to marry the mother is forbidden), he shall be liable to the dower, but he shall not be liable to punishment.

1329. (429.) If a man marries a woman for a thousand, payable in a year, she shall be entitled to one thousand after a year, and the husband is entitled to have intercourse with her before the expiry of the year, and before he has given her anything, according to Aboo Haneefa and Mahomed, on whom be peace; and Aboo Yusoof, on whom be peace, at first held the same view as Aboo Haneefa and Mahomed, on whom be peace, but he afterwards resiled from that view, and said that she is entitled to prevent access to her person until he pays her ten dirhems; but he again resiled from this view, and said that she is entitled to prevent access to her person until he pays her the whole of the dower by way of paying respect to her female person, and he remained constant to this view.

1330. (430.) If a man marries a woman fixing, by way of dower, two things, one of which is property (*mal*) and the other is not property, but she has some benefit (or advantage) in the (second) thing; as for instance, the divorce of her co-wife, or that he will not take her out of the town (or her place), or such like, and he fails to fulfil the condition, she shall be entitled to her proper dower.

1331. (431.) And proper dower shall be fixed after regard is had to the women of the wife's *asheera* (or relatives), from the side of her father; as for instance, her sister by the same father (and also her full sister), or her father's sister, or her father's father's sister, who are similar to her in the particular place, in property, in beauty, in age, and in (*husub*) personal qualification, and (*nusub*) paternal respectability, and the circumstances of the age (or time).

And Ibn-i-Aboo Laila, on whom be peace, says, that in fixing the proper dower regard is to be had to the tribe of the mother, such as mother's sister and others.

1332. (432.) And when proper dower is rendered obligatory by reason of marriage, if the husband divorces his wife before carnal intercourse, she shall be entitled to *Mootat* (that is, in cases where marriage takes place, and for some reason or other, as detailed in the numerous instances given above, the dower, for which the husband is liable, is the proper dower, then the wife, if divorced before co-habitation takes place, is entitled to the *Mootat;* because if dower had been named she would be entitled to half the dower named, but when dower is not named, but has to be fixed at the proper dower, as the result of the marriage, she shall be entitled to the *Mootat*, which, however, shall not exceed in value half of the proper dower, and shall not be less than five dirhems).

SECTION II.

ON "MOOTAT."

1333. (433.) *Mootat* consists of three articles of clothing, namely, a shirt, a bandage for the hair, and a (wrapper or) sheet (of quality), according to the circumstances (in life) of the man. Therefore, if the *Mootat* of the woman is higher in value than a moiety of her proper dower, she shall be entitled to the *Mootat* of value not exceeding the moiety of her proper dower, according to us (the Hanifites. Be it noted that a woman is entitled to *Mootat* when the husband marries her without mentioning a dower and divorces her before having intercourse with her).

And so also if a man marries a woman without mentioning the dower; and the husband, or the Kazee, fixes a dower for her; then the husband divorces her before having intercourse with her: she shall be entitled to *Mootat*, according to Aboo Haneefa and Mahomed, on whom be peace, and also according to the second view taken by Aboo Yusoof, on whom be peace. Aboo Yusoof, on whom be peace, was at first of opinion, and Shafei was also of the same opinion, that she shall be entitled to a moiety of what was fixed (by the husband or the Kazee, as aforesaid, after the marriage).

1334. (434.) And if a man marries a woman, and does not mention any dower for her, and another man stands surety (to her) for (her) proper dower, the suretyship shall be valid in the same way as it is valid in case the dower is named: therefore if the husband has carnal intercourse with her, the surety shall be held responsible for the proper dower; but if the husband divorces her before intercourse, and the *Mootat* in con-

sequence becomes obligatory (on account of the dower not being named and intercourse not being had), the surety shall not be held responsible for the *Mootat*.

1335. (435.) And if the woman, in lieu of the dower named, or in lieu of the proper dower, accepts a pledge; this is valid.

Thus, if she accepts a pledge in lieu of the dower named, and the property pledged is destroyed (in her hands), and after acceptance of the pledge, the husband divorces her before intercourse, then, if the property pledged is destroyed before the divorce, she shall be obliged to return half of the dower named; because the wife realises the whole of the dower by reason of the destruction of the property pledged, in case the property pledged was sufficient in value to the amount of the dower; but if the property pledged has been destroyed after divorce, before intercourse, then, according to us (the Hanifites), the woman shall be held to have realised a moiety of her dower, and the remaining moiety of the property pledged shall be held to have been destroyed in her hands as trustee (and the result will be that she is not bound to return any portion of the property pledged, half of which satisfied a moiety of her dower named, which was all she could get, and the other half was destroyed whilst she was a trustee, and as such trustee she is not liable for things destroyed in her hands).

Just as in the case of a pledge, where the pledgee (who holds the thing pledged as a trustee) makes a gift of the debt to the pledger, and the thing pledged is then destroyed (in the hands of the pledgee): according to us, the thing pledged is lost whilst it was held in trust (*i.e.*, with the character of trust attached to it); but according to Zoofur, on whom be peace, the thing pledged is lost with the result that damages to the extent of the original debt are liable to be paid by the pawnee to the obligor.

This is when something is given to the woman by way of a pledge for the dower named. But if something is given to the woman by way of pledge for her proper dower, and the property pledged is destroyed (in her hands) and then (after the destruction) the man divorces her before having intercourse with her, the woman shall be liable for the price of the property pledged, after deduction of the *Mootat* (because having received a pledge for her proper dower, her dower was satisfied, but the divorce having taken place before intercourse, she is entitled only to her *Mootat;* therefore she must return all except to the extent of her *Mootat*); but if the property is destroyed after divorce (which has been pronounced before

intercourse) but before she has expressed her intention to retain the property pledged in lieu of the *Mootat* (which is all she is entitled to in this case), Aboo Yusoof, on whom be peace, says, in the second view which he has taken that the property pledged shall be considered to have been destroyed whilst it was held by her in trust (and the result will be that the husband shall not be entitled to damages), and she shall be entitled to *Mootat* (notwithstanding the destruction, because trust property, if destroyed, does not entail liability to damages); and Aboo Yusoof, on whom be peace, in his first view—and that is also the view which Mahomed, on whom be peace, has taken—says, that the property pledged shall be considered to have been destroyed in lieu of *Mootat*, so that neither of the parties shall look to the other party for anything (that is, the woman shall not be entitled to *Mootat*, and the husband shall not be entitled to the value of the property pledged): but if the woman expresses her intention to retain the property pledged in lieu of the *Mootat*, and so expresses herself after divorce (which has taken place before intercourse), and after she has so expressed herself, the property pledged is destroyed in her hands; then Aboo Yusoof, on whom be peace, says, as a second view, that the property pledged shall be taken to have been destroyed in lieu of her proper dower, and, therefore, it is obligatory on her to return the proper dower, less the *Mootat* (because here the destruction was not of trust property, but of property, which she had expressed her intention to detain in lieu of her dower; therefore she has, in effect, realized her proper dower; but the divorce having taken place before intercourse, she is only entitled to a *Mootat*; therefore she must return the proper dower, less the value of her *Mootat*); and the view taken by Mahomed, on whom be peace—and that is the first view of Aboo Yusoof, on whom be peace—is that the property pledged shall be taken to have been destroyed in lieu of *Mootat*, and (therefore) neither party shall look to the other party for anything (because she having expressed her intention to retain property in lieu of her *Mootat*, she, therefore, realised the *Mootat* from the destruction of the property, and can have no further claim, and the husband can get nothing, because the property pledged was retained in lieu of the *Mootat*).

1336. (436.) When, between husband and wife, before sexual intercourse, separation takes place in consequence of the act of the woman, as for instance, when the woman becomes a *Moortud* (apostate from Islam) or by her kissing her husband's son (with passion) or in consequence of the exercise by her of the option of puberty, or (if she is a slave wife then

by the exercise by her) of the option of freedom when she is a female slave (of somebody else), or *Mookatuba* (of somebody else), which *Mookatuba* has been given in marriage by her master with her permission, whether she, the *Mookatuba*, be a minor or an adult, and then she, the female slave or the *Mookatuba*, obtains her freedom and annuls her marriage: then the whole of the dower drops (or ceases to be payable) and nothing (not even the *Mootat*) shall be obligatory on the husband.

1337. (437.) And so also if the wife is a female slave (of somebody else) and her master slays her intentionally or unintentionally before her husband has had sexual intercourse with her, the whole of her dower drops, according to Aboo Haneefa (because the dower would be the master's property, and he forfeits it) but his two disciples say, nothing (of the dower) will drop, and she is entitled to the whole of the dower (but she having been slain, her master will be entitled to it); but if the female slave kills herself, in that case there are two traditions from Aboo Haneefa, on whom be peace; but the correct of the two traditions is, that no part of the dower shall drop. *And if the female slave runs away (from her husband* after marriage and before intercourse), then, according to analogy, from what Aboo Haneefa, on whom be peace, says, there shall be no dower for the woman, until she re-appears; and this is also the view taken by Aboo Yusoof, on whom be peace. And if a free woman kills herself (after marriage and although before intercourse), no part of the dower shall drop according to us (the Hanifites), but Shafei has taken a different view.

1338. (438.) And if a *Mujoosy* (fire-worshipper) has been married *to a Mujoosy* husband, *and the husband then accepts Islam, and the* woman refuses to accept the Islam, separation shall be caused between them, and the whole of the dower shall drop (although there might have been sexual intercourse).

SECTION III.

ON THE RIGHT OF THE WOMAN TO REFUSE HERSELF TO THE HUSBAND FOR (HER CLAIM FOR) DOWER.

1339. (439.) When a woman is given in marriage for a dower named, she is entitled to withhold her person from her husband (that is, to prevent the husband having access to her), with a view to complete realisation of the dower. Therefore, if the husband is at a place where (it is usual that) some portion of the dower is prompt, and the balance is left with the

husband up to the time of divorce or death, as is customary in our country, the wife is entitled to withhold her person, with a view to the complete realisation of the prompt portion, and the prompt dower is that which is called in Persian (*dust pyman* or) hand-to-hand contract; and she is not entitled to demand from him the whole of the dower (including the deferred portion thereof). Therefore, if persons (belonging to the parties, through whose instrumentality the dower has been fixed) have specified the proportion of prompt dower, then that portion shall be prompt; and if they have made no specification (whether the dower is prompt or deferred, and what portion is prompt), then the circumstances of the woman shall be looked into, together with the dower named, and it shall be determined what proportion is usually prompt for a similar woman out of a like dower, and that proportion shall be considered prompt, and the prompt portion shall not be (arbitrarily) fixed as a certain proportion, such as a fourth or a fifth (without such an enquiry); and the usage shall be considered, because what is established by usage is to be taken as established by contract (and incorporated in the contract). But if in a contract of marriage those persons make it a condition that the whole of the dower shall be prompt, then the whole of the dower shall be held to be prompt, and the usage shall be left out. But if a portion of the dower is fixed as prompt, and the husband has paid the same, he is entitled to have intercourse with his wife; because, according to usage, intercourse is conditional upon payment of the prompt dower; and therefore that usage (to have intercourse after payment of prompt portion) must be regarded in the same light as if it had been expressly stipulated for.

And if the whole of the dower is deferred (as regards the time of payment to a fixed period), and the husband has stipulated for intercourse before payment of any portion thereof, he shall be entitled to have intercourse with her, as Aboo Haneefa and Mahomed, on whom be peace, have laid down. Therefore, if the husband has not had intercourse with her until the expiry of the period fixed for payment, he shall be entitled to have intercourse with her before payment of dower.

1340. (440.) And if a man marries a woman for prompt dower, she shall be entitled to go out (of the house) for her necessities, without the permission of the husband, as long as she does not get hold of her dower: and in the same way, if some portion of the dower is prompt, she shall be entitled to go out (for her necessities without the husband's permission), before the payment of the prompt portion of the dower: and after the

payment of the prompt dower, she is not entitled to go out (even for her necessities) except with her husband's permission.

1341. (441.) A female minor is given in marriage, and she goes to her husband before taking possession of the (prompt) dower: he who is entitled to exercise the right of prevention (or control) over her before marriage, shall be entitled to bring her back to his house and prevent (or withhold) her from her husband, until the husband shall give her dower to him who is entitled to receive the dower; because the right to refuse herself (to the husband) for (enforcing payment of) dower is the right of the woman, and this right cannot be avoided (*batil*) by the minor making it void.

And in the same way when a man gives his brother's daughter in marriage, she being a minor, and delivers her to her husband, before taking possession of the (prompt) dower, he is (still) entitled to prevent her to her husband (*i.e.*, by bringing her back and preventing the husband from having access to her), because a paternal uncle has no power to surrender her to her husband before taking possession of the (prompt) dower, therefore his delivery of her to her husband is not valid, (but the father can surrender her without taking possession of the dower.)

1342. (442.) When the husband is desirous of taking his wife from one place to another (that is, when he is desirous of undertaking a journey to a distance of three days, and is also desirous that his wife should accompany him) without her permission (or consent); then, if he is so desirous before the payment of the (prompt) dower, he shall have no such power; but after payment of (prompt) dower he shall have such power, according to Zahir-i-Ruwayet; and Abool Kasim Suffar, on whom be peace, has said, the husband has no power to take her from one place to another, although he might have paid her (prompt) dower; and this view is recognised by the lawyer Aboo Leith, on whom be peace; because times have degenerated so that there is apprehension of harm to her in the journey, which apprehension does not exist amongst the members of her tribe; but the husband is entitled to take her out (without payment of the prompt dower) from town to village or from village to town, or from one village to another, because taking her out to a place which is less than (what is called) a journey is not considered a journey, and this (*i.e.*, what Abool Kasim Suffar has allowed for the husband) is in effect, taking her from one *Mohullah* (or quarter) to another.

1343. (443.) A man gives in marriage his minor daughter: he shall be entitled to demand from the husband the (prompt) dower; but he shall not be entitled to demand her maintenance, when she cannot suffer the embrace of a man and cannot endure intercourse; because maintenance is the consideration of confining (the wife) for the (enforcement of the) rights of the husband, and the female minor, whose condition is such, is not capable of being confined for the purposes of the husband's rights; but the dower is the exchange for the woman's private person, and certainly he becomes the owner of that (by reason of the marriage), and he is, therefore, liable to a demand for the (prompt) dower.

1344. (444.) A woman gives her minor daughter in marriage and takes possession of her dower, the minor then attains majority and demands her dower from her husband: then if the mother is executor, the daughter shall not be entitled to demand the dower from her husband; because the husband is absolved from liability by paying the dower to the mother (who is an executor): but if the mother is not the executor, it is competent to the daughter to take the dower from her husband, and the husband shall then look to the mother for the same (*i.e.*, he shall realise the same from the mother); because when the mother is not an executor, it is not competent to her to take possession of the dower: neither has she (the mother) any authority to deal with the minor's property, and, therefore, payment to her (the mother) is equivalent to payment to a stranger.

And the same legal effect transpires in cases other than that of a father, or a grandfather, or the Kazee; because persons other than these are not entitled to deal with the property of the female minor or to take possession of her dower, although they (*i.e.*, the others) might have contracted the marriage by means of their authority as a guardian or a Vakeel.

1345. (445.) A man gives in marriage his daughter, who (though adult) is a virgin, or who is a minor (whether she be a *Syeeba*, or one once already married, or *Bakira*, or virgin) and demands her dower from her husband: he is entitled to do so, if the husband admits the marriage and the dower, and also admits that he has had no intercourse with her: (because after intercourse the father is not entitled to demand his daughter's dower unless she appoints him her Vakeel); and he shall (also) be entitled (in the same case) to litigate with the husband in the matter of her dower and maintenance, in which case it is not a condition that the woman should appear (before the Kazee) according to us (the Hanifites).

And if the husband has given anything to her by way of gift or sent to her anything by way of present, then the father's possession of the gift or present shall not be possession for her, and it is competent to the husband to get it (*i.e.*, to recover it) from the father (if instead of the wife, her father were to appropriate it for himself). But if the woman is an adult *Syeeba* (one who has already been married), then the father shall not be entitled to litigate (for the same) with her husband unless by authority from her; or if the woman is a virgin, and the husband denies the marriage and dower, then (also) the father is not entitled to litigate with her husband unless by authority from her; therefore (in the case of a virgin) if the husband says "I have had intercourse with her, and thou art not therefore entitled to take (or make demand for) the dower unless with her authority," and the husband (at the same time) denies that his wife has given any such authority (to her father); but the father says, "No, (thou hadst no intercourse with her); on the other hand, she is a virgin at my house;" and there is no proof (*byyuna*) adduced on the part of the husband, who asks the Kazee to call upon the father to take oath as regards his knowledge of the fact (whether he has had intercourse or not); then, according to Aboo Yusoof, on whom be peace, the oath shall be given to the father; because, if the father had made such an admission (that is, there had been *Khilwut* and intercourse) his admission would have been valid against himself, and the litigation by him would have become (null and) void (that is to say, the rule being that oath is administered only when admission would operate against the person and settle the dispute against him) the father, therefore, shall have oath given to him. And Khussaf says, in (chapter on) the duties of the Kazee (that is, whilst dealing with the chapter called "The duties of the Kazee:" or "rules regulating the practice of the Kazee") that the father shall not have oath administered to him, because the husband does not claim anything against the father (that is, because the father not being the defendant, oath shall not be administered to him) who, therefore, shall not have the oath administered to him: just as in the case of a Vakeel empowered to (realise and) take possession of debts: if the debtor says to such a Vakeel "Verily, thy client hast released me from the debt;" or, "Verily, have I already discharged the debt;" and intends that the Vakeel should be put on oath, he, the debtor, shall not be so entitled.

Therefore (when the father, after marrying his virgin or minor daughter, as aforesaid, litigates for her dower as aforesaid—see the very beginning of this paragraph) if the husband says that the father will take

the dower and will not surrender the daughter to him; then, if the father and the husband both agree with each other in the fact that the daughter is a minor and is not capable of bearing sexual intercourse, the Kazee shall order the husband to pay the dower to the father, and no regard shall be paid to the words of the husband.

But if the father (instead of supporting the husband as aforesaid) says "she is an adult; but I do not know her house, and I have no power to surrender her," and notwithstanding all this (*i.e.*, although he says she is adult, and he does not know her whereabouts, and has no control over her) he intends to take the dower from the husband, he (the father) shall not be entitled to do so; but if the father says (the daughter being a virgin) "she is an adult, in my house, I will take her dower, and I will send her to her husband," but the husband demands the (instantaneous) surrender of his wife; then the Kazee shall order the husband to pay the dower to the father; because the usage of people is to shew promptitude in realising dower, and to use delay in surrendering the woman (this explanation is intended to meet an objection that there were claims on both sides—the father demanding the dower, and the husband the surrender of the wife—then why should not the Kazee make orders in respect of both, or in respect [illegible]he latter); and what is established by usage is of the same efficacy as that of t[illegible]blished by contract; but the Kazee shall (also) ask the father which is est[illegible] to give surety for [illegible] receiving) the dower, so that when the father shall surrender the daughter t[illegible]husband, the surety shall be released: but if the father (after receiving the [illegible]ower on the undertaking to surrender the wife) is unable to surrender the [illegible]aughter, then the husband shall protect his rights by taking property from the [illegible] (*i.e.*, he shall recover the dower from the surety); because, when the father is unable to surrender his daughter, he shall not be entitled to take possession of the dower when she is an adult.

But if the litigation between the father and the husband is in one town, and the wife is in another town, which (latter town) is either the place where the marriage took place, or the place to which the woman has gone from the place where (the marriage took place and) the litigation is taking place, she having been married at the place of the litigation; as for instance, the litigation between them (the husband and the father) is at Kufa, and the woman is in Basra; then if the father says, "I will take the dower at this place (Kufa), and I will surrender her to her husband at Basra," the Kazee shall order the husband to pay the dower (here at *Kufa*)

and to go to Basra and to take delivery of her there (at Basra); and it is not obligatory on the father to take the woman to her husband.

1346. (446.) A man gives in marriage an adult virgin (who is his daughter), with her consent, for a dower named. He then accepts some land in lieu of the dower: the woman then receives intelligence of this, and she repudiates the acceptance of land (in lieu of dower): it is said, if this happens at a place where people recognise the taking of land in lieu of dower, then the woman's repudiation is not correct; because, when the acceptance of land in lieu of dower is recognised by usage, then such acceptance amounts to taking possession of dower, and the father is entitled to take possession of the dower of a virgin (with whom the husband has not had intercourse); but if it is not in accordance with usage to accept land in lieu of dower, then it is not valid (in the father) to take land (in lieu of dower) against the (claim of the) woman; because (such a course, in effect, amounts to this that) the father purchased land with her money whereas the father is not entitled to make the purchase (that is, to invest her money in land) as against his adult daughter: and in our country, the acceptance of land (in lieu of dower) is in accordance with usage in villages and not in towns.

And the acceptance (by the father) of a black (or negro) slave in the place of a white slave (fixed as dower), or the reverse, is tantamount to accepting land (in lieu of dower), and the father has no power to make such acceptance if the same is not justified by usage; and amongst the Turks (the Tartars) it is justifiable by usage to accept animals (used for loading, such as horses or cattle) in lieu of the dower named, in the same way as accepting land (in lieu of dower) is (justifiable) in accordance with usage in villages.

All this is when the daughter is an adult. But if the daughter is a minor, and the father takes land in lieu of the dower named, for several times below its value (*e.g.*, accepts land worth 200, in lieu of a dower of 2,000) then, if such a course is not justified by usage in the particular place, the act of the father shall not be valid as against her; because he has no authority to make a purchase, as against her, for several times above the value of the thing purchased: but if the same is justifiable by usage (that is, if it is the prevailing practice to fix a large amount by way of dower, and then to accept a small piece of land in lieu of the same) then the father's act is valid, and his acceptance of the land will amount to taking possession of the dower named.

1347. (447.) A man takes possession of the dower of his daughter, and then claims to have returned the same to the husband, and the husband supports him; but the wife falsifies her father: the learned lawyers have said that if the woman is a virgin (with whom her husband has not had intercourse) then the father shall not be believed (by the Kazee), unless he adduces evidence; because the father has power to take possession of the dower of the virgin (with whom her husband has not had intercourse); therefore, when the husband is released on account of the father taking possession of the dower, the father shall have no power to return the same to the husband.

But if the woman is a *Syeeba* (that is, if her present husband has had intercourse with her, whether she was formerly married or not), then the word to be accepted (if the trial is to be had without witnesses) is that of the father; because the father has no power to take possession of the dower of a *Syeeba*; and therefore when the husband has paid the dower to him, the dower shall remain with him, in trust in his hands, and (it is a general rule that) when the trustee claims to have returned trust property, the word to be accepted shall be the word of the trustee.

1348. (448.) A man gives in marriage his minor daughter; she then attains majority and the husband has intercourse with her; the wife then asks her dower from the husband, who says, "I paid thy dower to thy father when thou wert a minor," and the father supports him: the admission of the father, as against her, will not be valid; because the father has no power to take possession of the dower in such a case (when the daughter has attained her puberty, and the husband has had intercourse); he will therefore not have power to make an admission of his having received the dower (that is, bind her by making a statement that he has received her dower); and the wife shall be entitled to take (or enforce payment of) the dower from her husband, but the husband shall not be entitled to look to the father for (to recover) the same; because the husband's admission that her father had taken possession of her dower related to a time (*i.e.*, the minority of his wife) when the father had authority to take possession of the dower; and the husband therefore shall not make the father liable to him.

Just as a Vakeel who has been authorised to take possession of a debt: if such a Vakeel makes an admission that he has taken possession of the debt (*i.e.*, realised the debt), and the debtor supports him, but the creditor falsifies the Vakeel (in which case the Vakeel having authority to realise the debt,

his assertion that he has realised it is valid: so also the husband in the case in the text admitted payment when the father had authority, just as the Vakeel had authority in the illustration: here the analogy stops: because the wife will be entitled to realise the dower from her husband, but the creditor has no right against the debtor). And if the father, at the time he took possession of the dower from the husband, said, "I take the dower from thee on condition that I release thee from my daughter (*i.e.*, guarantee that she will make no claim)," and the rest of the case is as aforestated: then the woman shall be entitled to take the dower from her husband, and the husband shall be entitled to look to the father for the same. Just as a Vakeel who has been authorised to take possession of a debt; if he says to the debtor, "I take the debt from thee on condition that I release thee from so and so, who is the creditor;" the creditor then denies having given any authority to the Vakeel, and he (the creditor) realises the debt from the debtor, the debtor shall be entitled to look to the Vakeel for this, (that is, realise the amount from the Vakeel).

1349. (449.) A woman surrenders her person to her husband before receipt of her dower; she then refuses herself to her husband with a view to realise her dower: she is entitled to do so, according to Aboo Haneefa, on whom be peace: and Aboo Yusoof and Mahomed, on whom be peace, say, that she is not entitled to prevent her husband from having intercourse with her (having once surrendered herself to him). And traditions from them disagree in regard to her right to refuse journey: according to Abool Kassim Suffar, on whom be peace, she is entitled to prevent herself from (accompanying him in the) journey, although she might have realised her (prompt) dower: and verily have we already referred to this matter. (See paragraph 442.)

1350. (450.) A woman dies; the husband then says that she had made a gift of her dower to him whilst she was in health; but the heirs say, "No; she had made a gift whilst she was in the sickness of which she died:" some of our Mashaikhs (*i.e.*, those learned in the law who did not see Aboo Haneefa on whom be peace), have said, the word to be accepted is that of the husband (that is, in the event of the trial being proceeded with in the absence of witnesses, on mere oath): and in the (work called) Jamai Sagheer (by Mahomed) in the chapter on Wills, what is said leads to the inference that the word to be accepted is that of the heirs; because they deny the debt being extinguished (and in the absence of witnesses the oath

of the party denying is to be accepted) and because the gift in question is a thing, which has come into existence afterwards (that is, it is *Hadis* or a thing which has sprung into being after the debt) and it will, therefore, be referred to as relating to the nearest point of time (which is the state of sickness of which she died).

1351. (451.) A woman demands her dower from her husband, who says, at one time, that he has already paid the dower to her, and, at another time, says he has paid it to her father: the lawyers have said there is no contradiction in these statements; because payment to the father, who takes possession for the daughter, is tantamount to payment to her.

1352. (452.) A woman makes an admission that she is an adult, and she makes a gift of her dower to her husband: the lawyers have said that her size (or stature) shall be looked at; and if her size is like that of an adult woman, her admission shall be valid; so that, if she says afterwards (that is, after her size has been examined by the Kazee) "I was not an adult," her word shall not be received; but if her size is not like that of an adult woman, her admission shall not be valid: Moulana (the author of these Fatawa) says, it is proper for the Kazee to exercise caution in this matter (that is, in accepting or refusing to accept her declaration regarding her having attained full age) and he shall question her regarding her age, and he shall ask her, "How hast thou come to know this (that thou hast attained full age);" just as the learned have said in regard to a boy, who has made an admission regarding his having attained majority, that the Kazee shall question him for the reason for (which the boy thinks he has attained) majority, and the Kazee shall exercise caution in this matter.

1353. (453.) A man purchases for his wife some goods, and he also gives her dirhems, and she purchases goods with the dirhems; then there arises a difference between the husband and the wife; the husband says, the goods (which he gave and also those which she purchased) are out of the dower, but the wife says they were presents: it is laid down in the work (of Mahomed) that the word to be accepted is that of the husband (that is, without witnesses being examined) unless the matter (*i.e.*, the goods in dispute) related to edibles which are fit to be eaten (and not stored, such as wheat): and the learned lawyers have defined what are edibles, and have said, if the edibles consist of dates, or ground wheat (or flour), or honey, or a thing which can last, then the word to be accepted in regard to these is that of the husband; but if the edibles consist of things like meat, or

bread, or a thing which does not last, the word of the husband in regard to it shall not be accepted.

And Abool Kasim Suffar, on whom be peace, has said, that in regard to all goods which it is not indispensably necessary for the husband to purchase for her (that is, to purchase and give her), the word of the husband shall be accepted when he says that such goods were given for dower (although they may not be lasting things): and as regards such goods as it is obligatory on the husband to provide his wife with, such for instance, as, the shirt (*Dira,* or undercloth) and head bandage (*Khimar*), and the household furniture, the husband's word shall not be accepted: then Abool Kasim was asked "what about leather stockings (*Khoof*) and sheet (*Moolaut*)," he answered, "it is not obligatory on the husband to provide the wife with things to enable her to go out."

And the learned lawyer Aboo Leith, on whom be peace, says, that "the view taken by Abool Kassim Suffar is excellent (or well founded) and the same carries conviction to my mind."

1354. (454.) A man sends some goods to his wife, and the wife's father also sends some goods to the husband; then the husband says, "What I sent to thee was thy dower:" the word to be accepted shall be that of the husband, with his oath (that is, the goods being of the description set out in the previous paragraph); if, therefore, the husband takes oath, then if the goods (sent to the wife) are in existence, the wife shall be entitled to return the same; because the woman does not consent to accept the same as dower; and she shall be entitled to recover from the husband whatever remains due on account of the dower; but if the goods are not in existence, then if the same are (of the class called) similars (*mislee,* which are *Mukeelat, Mouzoonat* and *Adudee-i-Mootkarin*), the woman shall return to the husband similar goods; but if they are not (of the class called) similars, then the woman shall not be entitled to recover from the husband the remainder of dower (that is, those goods shall be taken in satisfaction of the dower).

But as regards such goods as the father of the woman sent (to the husband): if those goods are not in existence, the father shall not ask (a return of) the same (because the things were given by way of gift; and if the gift property is destroyed, the gift cannot be revoked); but if they are in existence, and if the father had sent them out of his own property (not from the wife's property) he (the father) shall be entitled to take them back from the husband; because the goods constituted a gift to a man who

is not of the donor's kin, and who is not unlawful to the donor (*ghyr zee ruhum-i-mohurrum*) and therefore he (the father) shall be entitled to have the same returned (that is, if the husband was not before marriage of the class called *zee ruhum-i-mohurrum*); but if the father sent the goods out of the property of his adult daughter, with her consent, then the father shall not be entitled to have the same returned to him; because they constitute gift on behalf of the woman, and if the husband or wife makes a gift to the other, then the gift property cannot be returned.

1355. (455.) A man marries a woman and sends presents to her, and the wife also, by way of return, makes presents to the husband; and she (herself) is also sent to him (from her house); then he separates from her (by divorce); the husband then says, "What I sent to thee was by way of loan (*areeyut*)," intending to take back those things; and the woman also then desires to get returned to her the things which she had sent by way of exchange: the learned lawyers have said that the husband's word shall be accepted in regard to the things he had sent, because he denies having made the woman owner of those things, and the woman is also competent to get back what she had sent, because she had considered that what she sent was by way of exchange for the husband's gifts to her; therefore, when the things sent by the husband were not gifts, then what she sent were not sent by way of exchange; therefore, it is competent to each of them to take back his or her goods.

And Aboo Baker Iskaf (shoe-maker) says if the woman, at the time she sent the goods, expressedly declared her intention that they were sent by way of exchange, then the result is as aforesaid (that is, she shall be entitled to get them back, and the husband shall also be entitled to take his goods back); but if she was not explicit, and she merely thought and meant the same to be by way of exchange, these goods shall be considered to be gifts on her behalf, and her intention shall be void (and the result will be that the husband will get back his things, but not so the wife; because the husband sets up a loan).

1356. (456.) A man makes proposal for (the marriage of) the daughter of a man; the father of the daughter says, "Yes, if thou wilt pay in cash the dower in six months," or "in one year," "then I shall give her in marriage to thee;" (that is, he asks the dower in advance, fixing a time of payment); after this the man sends presents to the house of the father, but he was not able to pay the dower in cash; the father, therefore,

did not give his daughter in marriage to him; is the man competent to take back what he had sent? The learned lawyers have said that what the man sent on account of dower, whether it is in existence or destroyed, he is entitled to take it back; and so also (he shall be competent to take back) what he had sent by way of presents if the same is in existence, but as to what has been destroyed, or what the father has destroyed, he is not entitled to anything out of that.

1357. (457.) A woman who has several slaves (male or female) says to her husband, "Maintain them out of my dower," and the husband acts accordingly; the woman then says, "I shall not give credit in my dower because you got yourself served by them:" Abóol Kasim, of Balkh, on whom be peace, says, what the husband has spent upon them for their usual maintenance, shall be credited towards the dower.

1358. (458.) A man gives his daughter in marriage, and delivers her to her husband together with marriage presents (*Juhez*); he then says that the presents were given by way of a loan: the learned lawyers have differed in this matter: some of them say that the word of the father shall be accepted; because ownership must be derived from the father, and therefore, when the father denies having created ownership, the word to be accepted shall be the word of the father (on his oath, if the trial is had without witnesses); whilst the others say that the word of the father is not to be accepted unless he produces evidence (he being considered as the plaintiff) because the presents (under such circumstances) usually become the property of the woman; and therefore, when the father denies her ownership, he falsifies what is obvious: and Moulana (the author of these Futawa) says that it is proper that the result should depend upon the circumstances (or details) of the case; so that if the father is a respectable man and of high position (and belongs to a class who usually make presents to their daughters on the occasion of marriage) the father's word shall not be accepted when he says that the *Juhez* was a loan; but if the father belongs to those who do not give to their daughters *Juhez*, like the one in question, his word shall be accepted.

Therefore, if the father (who has given *Juhez* to his daughter, as aforesaid), intends to reserve to himself the power to get back the *Juhez*, he should call witnesses at the time of sending the *Juhez*, (telling them) that the same is by way of a loan, or he should commit the *Juhez* to writing (*i.e.*, prepare a list) and write down in the paper an admission of the daughter that the same is by way of a loan in her hands, and have the paper witnessed (that is, ask per-

sons to be witnesses to what has been written) : and the learned lawyers have said that the fullest precaution in this matter is that the father should purchase all that is in the writing from the daughter for a certain price, and the daughter should then release the father from the price if she is an adult; and this precaution should be exercised, because it may be that the father had purchased some of those things for her during her minority; therefore the greatest precaution lies in what we have stated here.

1359. (459.) A man proposes to a woman, who is living in the house of her sister, and the husband of her sister does not consent to the marriage of this man, unless he gives him dirhems; the man who proposes, then gives him the dirhems and marries her: it is competent to the man to take back what he gave to the sister's husband, because the same is a bribe.

1360. (460.) A woman is in the *Iddut* of another man (whether in consequence of death or divorce); a man comes to her and says, "I will maintain thee as long as thou shalt remain in thy *Iddut*, on condition that thou shalt give thyself in marriage to me when thy *Iddut* shall expire." The woman then consents, and the man maintains her during her *Iddut*. The man is entitled to look to her for the (realisation of the) amount expended by him towards maintenance (that is, he will be entitled to take the amount back from her whether the marriage takes place or not) because the man maintained her on a condition which was invalid : and if he maintained her without any (express) condition, but he knew that he was maintaining her with a view to marry her (that is to say, his object and intention in maintaining her was to marry her ultimately, but the intention was not expressed in words), then the lawyers have differed in this matter : some of them have said that he shall be entitled to realize from her the amount he had spent in maintaining her; because, when he knew this (that he was maintaining her with a view to marriage) then his knowledge was tantamount to a condition : whilst others have said he shall not be so entitled; because he maintained her with the intention of marrying her, and not on condition of the woman giving herself in marriage : but Maulana (the author of these Fatawa), on whom be peace, says, it is proper that he should look to her (for the realisation of the amount spent by him for maintaining her); because when the husband knew that if he would not marry her, he would not maintain her, then his knowledge is equivalent to a condition, just as when a debtor makes a present of something to the creditor, then,

inasmuch as he did not make the present before borrowing, the present shall be unlawful; and so also the Kazee shall not accept special invitation, and the Kazee shall not accept presents from one who would not have made him a present if he were not a Kazee; and such invitation of the Kazee, or sending of the present to him, is equivalent to a condition, although the condition is not expressed in words (the condition being that he is invited, because he is a Kazee, and the object is to get his favor).

(See Fatawai Alumgiree, Vol. I, p. 463, line 20. A man supplies maintenance to the *Motaddah* of another man with the temptation, or *Tuma*, that he will marry her when her *Iddut* shall expire; but when her *Iddut* did expire, she refused to marry him: then if, whilst supplying her with maintenance, he made it a condition that he will marry her, he will be entitled to realise from her the amount of the maintenance, whether the woman gives herself in marriage to him or not: this is laid down by Sudr-ool Shaheed. But the correct principle is, that the man shall not be entitled to recover if the woman gives herself in marriage to him.

But if the husband made no condition, but supplied maintenance with the temptation mentioned above, then the learned lawyers have differed in this matter: and the correct rule is, that he cannot recover: so has it been laid down by Sudr-ool Shaheed: and Sheikh Ool Imam Oostad, says, that the correct view is, that the man shall recover, whether the woman should give herself in marriage or not, because this amounts to bribe, and this view is accepted in the *Mooheet*.

All this is where the man pays dirhems, that is to say cash, to the woman, who applies the same for her maintenance. But if she eats with him, he shall not be entitled to recover anything).

1361. (461.) A woman claims, after the death of her husband, that he owed her a thousand dirhems on account of dower: her word shall be accepted as far as the amount claimed goes to make up the full amount of her proper dower, according to Aboo Haneefa, on whom be peace; because, according to him, the amount of proper dower shall be the factor (or test) which shall decide the amount she has to receive (that is, when there is no evidence of the dower named).

1362. (462.) A woman dies, and her mother observes mourning, and the husband sends a cow to his wife's mother, who slaughters the cow and uses the meat during the period of mourning; the husband then intends to look to the mother for the price of the cow (that is, realise it from her): the

lawyers have said that if the husband and the mother are agreed that he (the former) had sent the cow to her (the latter), in order that she might slaughter it and feed those who were assembled near her in the mourning, and if the husband did not mention the price of the cow, he shall not get from her the price of the cow : because the mother destroyed, *i.e.*, slaughtered, the cow and used it for the feeding of the guests with his permission without there being a condition to take back the cow (or its price). And if they are agreed that the husband had sent the cow and stated its price, he shall charge the mother for its price; because they are (in effect) agreed that the husband made it a condition that he shall get the price of the cow, because price is never mentioned in making presents, and the price is only mentioned in order that the price might be charged for; therefore the mention of the price is equivalent to stipulating for a condition to charge the price.

But if the husband and mother differ on the question whether the price was at all mentioned, then the word to be accepted shall be that of the wife's mother, together with her oath, because the result of the difference is referable to stipulation for a condition for damages, for the mention of price is equivalent to stipulating for a condition for the payment of price (and therefore, the mother denies the condition, and the person who makes a denial, has to take oath, and then his word shall be accepted, provided there are no witnesses).

And Moulana (the author of these Fatawa), on whom be peace, says, it is proper that the word to be accepted shall be that of the husband; because the wife's mother claims to have permission to destroy (*i.e.*, slaughter) the cow without liability to pay the price, and the husband denies this; therefore the word to be accepted is that of the husband (on his oath), just as when a person gives to another some dirhems, and the latter maintains himself with the same, and the owner of the dirhems (*i.e.*, the former) then says, "I gave you a loan of the dirhems," and the person who got the dirhems says, "No, you made a gift of them to me;" then the word to be accepted shall be that of the person to whom the dirhems (originally) belonged.

SECTION IV.

ON REPETITION ("TUKRAR") OF DOWER.

1363. (463.) The dower is repeated sometimes by marriage (as for instance, when a man marries a woman for a dower and then divorces her; the dower then becomes payable: he then, after the *Iddut*, marries the

woman again, there shall be another dower for this second marriage. Thus the dower is repeated by marriage, that is, by the second marriage), and sometimes by carnal intercourse (an illustration of which will be given in the text), and sometimes by both marriage and carnal intercourse.

1364. (464.) As to the third mode. A man commits *whoredom* (*i.e.*, *Zina* or adultery) with a woman (that is, he commences an intercourse in sinfulness) and whilst he is on her person, he marries her: two dowers shall be obligatory on him; a proper dower shall become payable on account of the *Zina*; because the act of intercourse in its commencement was unlawful (though at the end it became lawful); but the act, regarded from the point of view of the satisfaction of the desire, is just one entire act, and the last part of it being lawful, no liability to punishment is incurred by reason of incipient lawfulness; the latter portion of the act, therefore, gives to the first portion of the act the character of doubt (as regards its illegality or unlawfulness); and an unlawful act must either cause liability to damages or liability to punishment; when, therefore, the liability to punishment is negatived (by reason of the doubt) there remains only the liability to damages, and proper dower will, therefore, become obligatory. And the dower named will be obligatory on account of the marriage; because the dower named at a marriage becomes perfected by retirement (*Khilwut*), and more so by the completion of the carnal intercourse.

1365. (465.) A second illustration (of the third class mentioned above) is this:—A man says to a woman, "Whenever (or as often as) I shall marry thee, thou art divorced;" he then marries her three times in one day, having carnal intercourse with her each time: then (the result is that) two divorces shall take place on her, and, therefore, two dowers and a half shall be obligatory on him, according to analogy from what Aboo Haneefa and Aboo Yusoof, on whom be peace, have said; because as soon as he married her for the first time, one divorce took place on her (immediately the very instant the marriage took place, before carnal intercourse) and half the amount of dower became obligatory on the man by the divorce which took place before carnal intercourse; then when the man has carnal intercourse with her, it will be obligatory on her to observe *Iddut*, because as regards this carnal intercourse, it is doubtful whether the same is unlawful; for according to Shafei, on whom be peace, no divorce is effective which is made dependent on marriage (for, according to Shafei, the husband must

have ownership in the wife at the time he utters the formula of divorce; therefore, such a divorce as is set out in the text is not at all valid according to him; because, at the time the formula is uttered the husband was a stranger. But according to Aboo Haneefa, in order that the divorce should be valid, the husband must have ownership in the woman (*i.e.*, must be the husband of the woman, or the divorce must be referred to a circumstance which is the cause of that ownership, and that is marriage. The divorce having taken place before intercourse, strictly speaking, the intercourse was of the nature of *Zina*, which would not involve *Iddut*, but inasmuch as Shafei does not recognise such a divorce, there arises a doubt whether the intercourse was of the nature of *Zina*: the view taken by Shafei shows that the act might be lawful, and in cases of doubtful connexion *Iddut* is obligatory as well as dower, and the dower that is payable is the proper dower: the result, therefore, is, that by reason of divorce taking place before intercourse, half of the fixed dower becomes payable; and by reason of intercourse of doubtful nature, as regards its unlawfulness, the full proper dower becomes payable).

Then when the husband marries her a second time, he does so whilst she is in her *Iddut* (on account of the doubtful connexion aforesaid) and (by virtue of the original condition) a second divorce takes place upon her; and this divorce is reversible, according to Aboo Haneefa and Aboo Yusoof, on whom be peace; because, according to them, when a man marries a woman who is in her *Iddut* (from him, and not from another, because in the latter case the marriage itself is void) and then divorces her before intercourse, this divorce shall be considered as divorce after a supposed intercourse, although the *Iddut* might be on account of intercourse of a doubtful nature; and divorce after intercourse is reversible, and creates liability for the whole of the dower; therefore the whole of the dower named at the second marriage is rendered obligatory (but a moiety only would have been due in consequence of the divorce having taken place immediately after marriage and before intercourse, but the assumed intercourse on account of the *Iddut* intervenes between the divorce and the marriage, and the divorce therefore takes place after intercourse); therefore two dowers and a half are thus united against the husband (that is half of the dower by reason of the first divorce, which was before any sort of intercourse, actual or constructive, one proper dower by reason of intercourse of doubtful unlawfulness, after the first marriage and before the second marriage, and a third dower, that is, the full dower named, by reason of divorce

in the second marriage after the supposed intercourse); the third marriage is not valid, because the woman is in the *Iddut*, consequent on the reversible divorce (because, when the divorce is revocable, the marriage still subsists, and is not put an end to until after the expiry of the *Iddut* and here, after the second marriage, which was accompanied with a reversible divorce, there was intercourse, and therefore the divorce was revoked: so that there was no divorce, and the woman was still his wife) and therefore the third marriage counts for nothing; and therefore the dower fixed at the third marriage is not payable. Moulana (Kazee Khan, the author of these Fatawa), says, this case (that is, that part of it which says, that the third marriage having taken place during the *Iddut*, the marriage itself is not valid) is an illustration of the tradition which I have already mentioned, *viz.*, when the husband renews his marriage with a woman who is already his wife, he is not liable to dower in respect of the second marriage. (See paragraph 399). And the husband shall not be liable to dower for having had intercourse after the third marriage; because he (really) had intercourse with his wife.

1366. (466.) And if a man says, "As often as I shall marry thee, thou shalt be divorced *irreversibly* (*bain*)," and he marries her three times (as in the case in the previous paragraph) and has intercourse with her each time, then she will be absolutely separated from him after three divorces (so that he cannot marry her again until the legaliser's aid is brought into requisition) and he shall be liable to five dowers and a half, according to anology from what Aboo Haneefa and Aboo Yusoof, on whom be peace, have said:—half of the dower by the first marriage (because the divorce took place immediately on marriage and before there was carnal intercourse; and the rule is, that if divorce takes place before intercourse, half of the dower becomes due); and her proper dower becomes due by the first carnal intercourse (which took place after divorce, under circumstances of doubt, as set out in the previous paragraph, and doubtful intercourse involves liability to her proper dower); and one (full) dower by the second marriage (because the second marriage took place during the *Iddut*, and the divorce, therefore, took place after a constructive intercourse), and a (proper) dower becomes due by the second intercourse; because the husband had intercourse with her under doubt (the doubt being in reliance on what Shafei has said as in the case in the previous paragraph); and one dower becomes due by the third marriage, because the third marriage took place when the woman had become (*bain* or) fully separated (by the divorce

caused at the second marriage, after which the husband has no right to take her back without marrying her, and therefore the third marriage shall be taken into account); and a (proper) dower becomes due by reason of the third intercourse, because that intercourse is intercourse under doubt (arising from Shafei's view): thus five and a half dowers become unitedly due against the husband. But according to what Mahomed, on whom be peace, says, four and a half dowers would become due (in this way, that one dower and a half would become due) on account of (three divorces following) three marriages before intercourse (which marriages having been dissolved by instantaneous divorces, involve liability to three halves of one dower each) and three (full) dowers, by reason of three intercourses under doubt (arising from the intercourses, according to Shafei's view).

1367. (467.) And as a consequence of this difference (between Aboo Haneefa and Aboo Yusoof, on the one hand, and Mahomed on the other, the difference being this, that the first two assume a constructive intercourse in the case of a marriage during an *Iddut*; so that if divorce takes place after such marriage and before actual intercourse, the whole dower would become due, by reason of the constructive intercourse; but, according to Mahomed, constructive intercourse is not to be assumed, and therefore, according to him, only half the dower would become due on account of the divorce, which took place before any intercourse), according to Aboo Haneefa and Aboo Yusoof, on whom be peace, when a man marries a woman and has intercourse with her, and then divorces her by way of irreversible divorce (*bain*), and then marries her during her *Iddut*, and then divorces her before having intercourse with her in the second marriage; then he shall be liable to one dower on account of the first marriage (because in the first marriage he had actual intercourse, and the divorce was after such intercourse), and to one full dower on account of the second marriage, because of the (constructive) intercourse following the second marriage (which took place during the *Iddut* of the first divorce); and according to them another *Iddut* to be observed in future shall be obligatory on the woman; (but according to Mahomed, one dower and a half will be due, because the first marriage was followed by actual intercourse, which perfected the liability for full dower, and the second marriage not being followed by any intercourse, only half of the dower will become due; and in addition to this, according to Mahomed, there shall be no future second *Iddut*, because the second marriage was not followed by intercourse).

1368. (468.) And as a consequence of this difference (set out in the previous paragraph), if the husband does not divorce the wife after the second marriage (the case being as in the previous paragraph), but the woman becomes absolutely separated (*bain*) from her husband (that is, becomes absolutely unlawful to him) before (actual) intercourse, by reason of some act done on the part of the woman, such, for instance, as her becoming an apostate from Islam (*Moortudda*), or having intercourse with her husband's son; then, according to Aboo Haneefa and Aboo Yusoof, the husband shall be liable (in addition to the dower on account of the first marriage) to a full dower (on account of the second marriage, such dower having become perfected by constructive intercourse; but according to Mahomed, only the dower on account of the first marriage will be due: if the divorce takes place by an act of the husband, the result is stated in paragraph 467; if separation takes place by an act of the wife, *and the husband has not had intercourse with her,* then she is not entitled to any dower. See paragraph 436).

1369. (469.) And, as a consequence of this difference (if a man marries another person's slave-girl, and has actual intercourse with her, and then gives her irreversible or *bain* divorce, and then marries her again during the *Iddut* and) if the woman (who) is a slave-girl (as aforesaid), and she gets her freedom (after the second marriage) and exercises her option (of freedom) before the husband has (actual) intercourse with her (after the second marriage): then, according to Aboo Haneefa and Aboo Yusoof, the husband shall be liable to the full dower on account of the second marriage (by reason of the constructive intercourse, in addition to the dower on account of the first marriage: and according to Mahomed, who does not recognise a constructive intercourse, no dower shall be payable for the second marriage).

1370. (470.) And, as a consequence of this difference, if a woman marries a man of a different *Koofoo*, who has intercourse with her, and the woman's guardian then refers the matter to the Kazee, and separation is caused (by the Kazee), and consequently the dower and *Iddut* become obligatory (the separation having taken place after intercourse), and the same man then again marries the same woman (during the *Iddut*), without a guardian, and the Kazee decrees separation between them before (actual) intercourse in the second marriage: then, according to Aboo Haneefa and Aboo Yusoof, full dower shall be obligatory on him (on account of the

second marriage, by reason of constructive intercourse), and a second *Iddut* to be observed in future shall become obligatory on her; (but, according to Mahomed, the dower on account of the first marriage will be due, and half of the dower on account of the second marriage, before actual intercourse, will be due; because after the second marriage the separation, which took place before intercourse, was not in consequence of an act of the woman, but in consequence of a decree of the Kazee).

1371. (471.) And also, as a consequence of this difference, when a man marries a female minor, who has been given in marriage by her guardian (other than father or grandfather), and has intercourse with her, and the wife then attains puberty and annuls the marriage (by exercising her option of puberty), and separation is caused between them (by the Kazee); the husband then marries her during the *Iddut*, and then divorces her before having actual intercourse with her: then, according to Aboo Haneefa and Aboo Yusoof, full dower shall be obligatory on him (for the second marriage, in addition to the full dower for the first marriage) and a second *Iddut* to be observed in future shall be obligatory on her (on account of divorce after second marriage; and according to Mahomed, one dower and a half is payable, and no *Iddut* shall be observed after the divorce).

1372. (472). And also, as a consequence of this difference, if a man marries a female minor, and has intercourse with her; he then divorces her in the form of an irreversible divorce, and then marries her during the *Iddut*; the woman then attains puberty, and annuls her marriage (by exercising her option of puberty) and separation is caused between them (by the Kazee); he shall be liable for full dower (on account of the second marriage), and she shall have to observe a second *Iddut* in future: (and according to Mahomed, no dower shall be payable for the second marriage, which was annulled by an act of the woman before intercourse).

1373. (473.) And also, as a consequence of this difference, if a man marries a woman and has intercourse with her; the woman then becomes an apostate from Islam (*Moortudda*)—may God save us!—and then again accepts Islam; and the husband then marries her during the *Iddut*, and the woman then again becomes an apostate from Islam before intercourse (two dowers shall be due, according to Aboo Haneefa and Aboo Yusoof: one dower shall be due for the first marriage, in which there was intercourse; and as the second marriage took place during the *Iddut* of the first marriage, therefore, there was constructive intercourse; and one dower shall be

payable for this: according to Mahomed, the dower fixed in the first marriage only shall be payable; and as the second marriage was not followed by intercourse, and as the marriage became annulled by an act of the woman, therefore, no dower is payable for the second marriage).

1374. (474.) And also, as a consequence of this difference, if a man marries a female slave, and has intercourse with her; the woman then becomes free, and annuls her marriage, and the man afterwards marries her during the *Iddut*, and then divorces her before having intercourse with her (he shall be liable to two dowers, according to Aboo Haneefa and Aboo Yusoof, and to one and-a-half, according to Mahomed).

1375. (475.) And also, as a consequence of this difference, if a man marries a woman, the marriage being invalid, and has intercourse with her, and separation is caused between them (by reason of the invalidity of the marriage); the man then marries her during the *Iddut*, the marriage being valid, and he then divorces her before having intercourse with her: he shall, according to Aboo Haneefa and Aboo Yusoof, on whom be peace, be liable to one full dower (on account of the second marriage, in addition to the full dower for the first marriage), and the woman shall have to observe a second *Iddut* in future (and according to Mahomed, one dower is due for the first marriage, and half for the second, because separation took place before intercourse).

1376. (476.) Now (as to the second class) regarding dower, which is repeated by carnal intercourse (only, and not by marriage and carnal intercourse).

A man marries a woman, the marriage being invalid, and has intercourse with her several times; then separation is effected between them (by reason of the invalidity of the marriage): Mahomed, on whom be peace, says, the husband is liable (only) to one dower, and he (Mahomed) says so, because all the acts of carnal intercourse have been done under one and the same doubt of lawfulness, and this doubt is the doubt which arises from the invalid marriage. (Here there is no repetition of dower).

1377. (477.) And another case is, when a man purchases a female slave and has intercourse with her several times; then she is found to be the property of somebody else (in such a case the result is that the intercourse took place with another's female slave under circumstances of doubt, which removes liability to punishment, but involves liability to dower, and the question is, whether dower is due for each intercourse or only one dower

is due altogether): the man will be liable to one (proper) dower, because the several acts of intercourse were founded upon one cause, and that cause was ownership under the apparent circumstances: but if only half of the female slave is found to be the right of another, the man (that is, the purchaser) will be liable to half of the (proper) dower, which shall be payable to the person whose right is found in the female slave. And in case of a female slave being owned by two men, if one of the two owners has intercourse with her several times, he shall be liable to half of the (proper) dower for each intercourse; because, says Hisham, on whom be peace, the man knew at the time of each intercourse, that half of the female slave was not his property.

1378. (478.) A man has intercourse with the female slave of his son several times: he is liable to one dower, because each intercourse took place by one cause of doubt, and this doubt is the doubt that the father might be (properly and rightfully) owner of his son's property. But if the son has intercourse with the female slave of his father several times, and claims doubt (that is, says, "I thought that my father's property was lawful to me, and thus there was doubt of unlawfulness)," he (the son) is liable for each intercourse to a (proper) dower; because dower became obligatory, the cause being that the son claimed doubt; because if he did not claim doubt, he would have been liable to punishment; therefore if he repeated his claim of doubt, the liability to dower (also) became repeated (thus shewing that if he claimed doubt for one act of intercourse, and not for another, he would be liable to punishment for the latter, and no dower would then become obligatory for this act): contrary to the case of the father, who is not obliged to claim doubt (because the Hudees says, the son and his property belong to the father, and therefore the Kazee shall take no proceedings against the father; and, therefore, there is no necessity for the father to claim immunity: but the Kazee shall proceed against the son who, if he claims the doubt, will be free from punishment).

And if a man has intercourse with the female slave of his wife several times, and claims doubt (for each act), then this case is similar to that of a son who has intercourse with the female slave of his father several times, and who claims doubt: therefore, for each intercourse (with the wife's female slave), the man is liable for one dower, because he is reduced to the necessity of making a claim of doubt.

1379. (479.) And if a man has carnal intercourse with his female

Mookatuba several times, he shall be liable to one dower; because the cause of each (act) is one and the same, and that cause is the existence of right of ownership.

But if he has intercourse several times with a female *Mookatuba* who is common to him and to another (that is, who is owned by both), then he shall be liable for all the acts of intercourse to a moiety of the dower in respect of that moiety interest in the *Mookatuba* which is owned by himself; but in regard to the other moiety (in the *Mookatuba*, which is owned by the other man), he shall be liable to a moiety of the dower for each act of intercourse; and all these moieties (of both kinds) shall belong to the female *Mookatuba*.

1380. (480.) A man has carnal intercourse with his wife several times, and then finds that he had made her divorce conditional upon an event which had already occurred, and that consequently the divorce had taken effect (that is, after the divorce had taken effect, he had had sexual intercourse with her several times): he shall be liable to one (proper) dower, (because the cause is one, and that cause is the doubt of marriage): just as if he purchased a female slave and had intercourse with her several times, and she was then found to be the property of another, he would in that case be liable to one dower. (See paragraph 477.)

1381. (481.) A boy of fourteen years (*i.e.*, a minor) has intercourse with a woman who is asleep, and is not aware of the fact: then if she is a *Syeeba* (one who has had intercourse with a man), the boy shall not be liable to punishment (*Hudd*), or Ookur (that is, the proper dower which is obligatory in cases of intercourse in invalid marriages); but if she is a virgin (or *Bakira*, that is, one who has not had intercourse with man), and he has ruptured her virginity, he is liable to her proper dower; and so also if she is a female slave; then if she is a *Syeeba*, he is not liable to anything, but if she is a virgin (*Bakira*), and he has ruptured her virginity, he is liable to her (proper) dower: and so also if the boy is insane.

1382. (482.) A man falls upon his wife, and when they become united, he divorces her, whilst he is in this state of union, and he then completes his intercourse after the divorce having satisfied his necessity, and then separates from her: Mahomed, on whom be peace, says—and this is one of two traditions from Aboo Yusoof, on whom be peace—that the husband shall not be liable to punishment or dower, because the whole act of intercourse is one act (regard being had to satisfaction of necessity);

therefore, when the first part of the act of coition and the last part of it are lawful (the whole act consisting of one act, and therefore regarded as a whole), then he shall not be liable to punishment, and not to a (fresh) dower, (in addition to that fixed at the marriage), unless the husband, after divorce, disconnects himself from her and recommences the intercourse (in which case, there will be various acts of intercourse, and the intercourse being found after divorce, another dower will be due, which shall be the proper dower); but when he does not so act, but on the other hand, proceeds on, after divorce, with the same act which he first commenced, until emission takes place, then he will not be liable to (a fresh) dower: but according to (a second tradition from) Aboo Yusoof, on whom be peace, and this is the view of Zoofur, on whom be peace, a (fresh) dower will be obligatory, although, after divorce, the husband did not disconnect himself from her and recommence the intercourse (because the act, after divorce, is found during the *Iddut*, and such an act involves liability to dower, the act having taken place whilst there is a doubt of lawfulness).

And, as a consequence of this difference, if the divorce was reversible, then, according to the view of Mahomed, on whom be peace, and according to one of two traditions from Aboo Yusoof, on whom be peace, the husband shall not be held to have revoked the divorce (if he goes on with and finishes the same act which he commenced, whilst the marriage was subsisting, because no fresh act was found after the divorce); but according to the second tradition (from Aboo Yusoof), and that is the view of Zoofur, on whom be peace, the husband will be held to have revoked his divorce (because they consider that when the man went on with the act after the divorce, this was tantamount to a fresh act during the *Iddut*, so much so that fresh dower becomes due; but when the man has disconnected himself and he then again connects himself, then, without any difference, this will amount to revocation of the divorce).

And also, as a consequence of this difference, if a man says to his female slave, after the junction of their places of circumcision, "Thou art free," and then completes his intercourse, he shall not be liable to *Ookur* (dower due from intercourse), according to Mahomed, on whom be peace, except when, after giving the woman her freedom, he disconnects himself and then effects penetration again (when, without any difference, the *Ookur* will be obligatory).

1383. (483.) Two brothers marry, one of them marrying a woman, and the other marrying her mother; but each of the women is taken to

the husband of the other, and intercourse takes place accordingly: Aboo Yusoof, on whom be peace, says, each of the wives shall be separated from (or become unlawful to) her husband; and each of the husbands shall be liable to pay to his wife (that is, the woman whom he had originally married) half of the dower (because before intercourse with the wife, separation took place), and each of those who had intercourse with each of the women, shall be liable to (*Ookur*), proper dower (for her with whom he had intercourse), and nobody shall be competent to marry again his wife (with whom marriage had taken place) after this; (because he who married the mother, had intercourse with her daughter, and cannot therefore marry the mother again; and he who married the daughter, having had intercourse with her mother, cannot marry the daughter again); because unlawfulness (or prohibition of marriage) became established by intercourse with the woman with whom he had intercourse (that is, by intercourse with the wife's mother or the wife's daughter as the case may be); but it is competent to the husband of the mother to marry her daughter, with whom he had intercourse, because he did not have intercourse with the mother of the daughter (and the rule is that a woman's daughter becomes unlawful, not by mere marriage with the woman, but by intercourse with her); but it is not competent to the daughter's husband to marry the mother, because the mother becomes unlawful to the husband by his mere marriage with the daughter (without intercourse. See paragraph 280).

And so also if between the husbands there is no relationship whatever (because what governs the case is the relationship between the wives).

1384. (484.) A man and his son marry two sisters; then each of the wives is taken to the husband of the other, and each has intercourse with her (that is the wrong wife): each of the two men shall be liable to the (*Ookur*) proper dower of her with whom he has had intercourse, because he has had intercourse under circumstances of doubt; but neither of them shall be liable to the dower of his wife; because each wife became separated before intercourse was had with her by an act which proceeded from her, and this act consisted of her consent that intercourse should be had with her.

(*Note.*—I have in vain searched in other works for this case to discover an explanation of the reason assigned here for the rule).

1385. (485.) A man marries a woman, and his son marries her daughter, and each wife is taken to the husband of the other; and the men have intercourse with the women (*i.e.*, the wrong wives): then he who first

had intercourse will be liable to half of the dower of his wife, because the wife became separated from (and unlawful to) her husband before the husband has had intercourse with the wife by an act which proceeded from the husband (and that act consisted of his having intercourse with the wife's daughter, or her mother as the case may be) and he (that is, who first had intercourse) will be liable to the full (proper) dower of her with whom he has had intercourse; and he who has intercourse subsequently shall not be liable for anything to his wife, because his wife became separated from (and unlawful to) him before his having intercourse with his wife, by reason of intercourse which the first-mentioned man had with the woman (who was not his wife) by her consent: and if both of them have intercourse at one and the same time, then neither of them shall be liable for anything to his wife (but he shall be liable to the full proper dower of the woman with whom he has intercourse. See Fatawai Alumgiree, Vol. I, p. 459, lines 13 to 20).

1386. (486.) A man says to his wife before intercourse, "Thou shall be divorced, when I shall have retirement with thee;" or "When I shall have retirement with thee, thou shalt be divorced;" he then has a retirement with her, and has also intercourse with her: he shall be liable to one (proper) dower (by reason of intercourse) and half of the (named or fixed) dower (by reason of divorce before intercourse); because dower becomes perfected by reason of the retirement, only when retirement continues for such a time as is sufficient for intercourse (such retirement having taken place during the continuance of the marriage); but such interval of time was not found here: but if the man (had a meeting with her, but) had not intercourse with her, he shall be liable to half of the dower: (a retirement to be sufficient to perfect the right to dower, must last, *in the marriage state*, for a time sufficient to enable the husband to have intercourse; here, as soon as there was retirement, there was divorce; therefore a moiety of the dower is due for divorce before intercourse, or valid retirement; and the intercourse which is found, is found after divorce, during the *Iddut*, and intercourse during the *Iddut* involves liability to a full dower owing to doubt of lawfulness).

SECTION V.

Regarding Retirement, or "Khilwut."

1387. (487.) Dower is perfected by three things (that is, after these things the right to dower is never extinguished except by satisfaction):—(1) By carnal intercourse; (2) by the death of one of the parties; (3) by valid retirement.

By a (Khilwut-i-Suheeh or) Valid Retirement is meant the meeting together of husband and wife at a place where there is nothing to prevent the husband from having sexual intercourse, whether the prevention (*i.e.*, the preventive cause) might be perceptible to the senses (*e.g.*, sickness); or recognised by law (*e.g.*, fast of *Ramzan*), or might arise from natural causes (*e.g.*, menses).

1388. (488.) When a husband retires with his wife, and one of them is sick, not having ability for sexual intercourse, or has made *Ihram* for a pilgrimage, be it *farz* pilgrimage or *nufil* pilgrimage, or is observing fast of the kind which is *Farz*, or is saying *Farz* prayers, the retirement is not valid.

And in regard to fasts of the different kinds called *Kuza*, or *Nuzar*, or *Kuffara*, there are two traditions; but the more correct view is that these do not prevent retirement. And the fast called *Nufil* fast, does not prevent retirement, according to Zahir-i-Ruwayet; and some of the lawyers have held that if fast (of the kind called *Nufil*) has reached a time which is past noon, then the fast prevents retirement (*i.e.*, if the husband and wife retire after noon has past away, then the retirement is not a valid one, because even a voluntary fast such as a *nufil* fast is, becomes obligatory when it has been kept till past noon): and prayers of the kind called *Nufil* do not prevent retirement: and menses and impurity after child-birth do prevent retirement, because these are preventives (of intercourse) both by law and nature.

1389. (489.) And if with the husband and wife there is a person who is asleep, or one who is blind, then the retirement is not valid: and some of the lawyers have said that, according to Aboo Yusoof and Mahomed, on whom be peace, the person who is asleep does not prevent retirement. And if with them is a minor who has no reason (*ak'l*), or a person who has fainted, then this does not prevent retirement; but according to Aboo Yusoof, on whom be peace, a person who has fainted, or one who is insane, prevents retirement. And if with them there is a minor who has reason, so that he can describe what takes place between them, then the retirement is not valid: and if with them there is a deaf or a dumb person, then the retirement is not valid: and if there is with them a slave-girl of one of them, or another wife of his, then Mahomed, on whom be peace, used to say, at first, that if the slave-girl belonged to the husband, then she did not prevent the retirement; because

it is competent to the husband to have intercourse with his wife in the presence of his slave-girl, or of another wife of his; but he resiled from this view, and said that the slave-girl of either of them, prevents the retirement; and this is the view of Aboo Haneefa and Aboo Yusoof, on whom be peace; and accordingly it is abominable to have intercourse in the presence of another wife.

1390. (490.) And if with the husband and wife there is a dog belonging to either party, then there is a tradition from Sheikh-ool Imam Shams-ool-Ayma Hulwany, on whom be peace, that he said that the dog of the wife prevents retirement, because the dog may not bear (to see) his mistress lying flat under the husband, and he may attack the husband; not so the dog belonging to the husb[illegible] does not prevent retirement for the reason to be inferred from the one mentioned above).

1391. (491.) And retirement is not valid in a mosque, or in a bath (*Hummam*, because the mosque and the *Hummam* are public places) and some have held that in the night retirement in the mosque is valid as it is valid in a bath: and retirement is not valid in a highway: if the husband takes his wife towards a village (*i.e.*, to an uninhabited place), to the distance of one *Fursukh* (*i.e.*, three miles), or two *Fursukhs*, and then diverges from the main path, then this would be retirement, according to *Zahir-i-Ruwayet*.

1392. (492.) And if the wife comes to her husband, but the latter fails to recognise her as his wife, or if the husband comes to his wife and stays for a while and then goes away without recognising her; then there is a difference (whether this should be held to be retirement or not): the lawyer Aboo Leith, on whom be peace, says, this will not amoun to retirement, and the husband shall be believed (when he says) that he did not recognise her (that is, in the event of the wife suing for her dower as upon a valid retirement).

1393. (493.) And retirement is not valid in a plain (*Sahra*) although there might be nobody near the husband and wife, if they are not secure against the passing of the people. And so also if they have retired to a terrace on the sides of which there is no *Sitr* (or elevation), or if the *Sitr* is thin, or small, so that if a person should stand (about the place) his gaze would fall on them, then the retirement is not valid, when they apprehend that some other person might take note of them; but if they are secure against anybody taking note of them, then the retirement is valid.

1394. (494.) And if the husband and wife have in the night or during the day retired in a *Mahmil,* (or a litter for travelling on a camel) which is all covered over, then if it is possible to have intercourse in it, the retirement is valid. And if they have retired into a room which is without a roof, or into a grotto of grapes, the retirement is valid, according to *Zahir-i-Ruwayet*: and so also if they retire in the open plain which is unfrequented, the retirement is valid in the same may as in the *Mahmil*: and if a man happens to be on his way to a pilgrimage (and breaks journey) without *Khema* (or tent), and retires with his wife (when there are other passengers, or there is a chance of other people passing to and fro) the retirement is not valid.

1395. (495.) And if there are three or four rooms, one after the other, if the husband retires with his wife into the last room, then if the doors are open so that any person intending to approach them can do so without asking their permission, the retirement is not valid.

And if the husband retires with his wife into a room in a house, the door of which opens into the house, so that another person, whether a relative or a stranger, if he intends to approach them, could do so (without notice to them), the retirement is not valid.

1396. (496.) And if the husband with his wife are in the *Caravanserai* on the (raised) platform (in front of a room) and people are assembled below in the *Caravanserai,* so that if they look at them, they could see them, then the retirement is not valid.

1397. (497.) A sick man's wife is brought to him and is reached to his room, and he is unable to make her out, and the woman goes out of the room in the morning, and the husband is then informed of the circumstance, and he then says, "I did not make her out," and he then divorces her, and the woman claims that the husband did make her out: then the word to be accepted is that of the husband, that he did not make her out (that is to say, if he takes oath): but if the husband did know her, and had ability to have carnal intercourse with her, the retirement is valid, and he shall be liable to the whole of the dower.

1398. (498.) The retirement of one who is impotent is valid, and so also the retirement of one whose male organ has been cut off, according to Aboo Haneefa, on whom be peace. And *Rutk,* or closing of the passage of the woman, prevents retirement, because it prevents sexual intercourse.

And it is said in the Book on Divorce in the Asul (of Mahomed) that

Iddut is obligatory on women whose passage is closed, and she is entitled to half of the dower (half only, because the retirement is not valid).

1399. (499.) And the retirement of a boy, so that one like him cannot have sexual intercourse, is not valid : neither is the retirement with a female minor, so that with one like her a man cannot have sexual intercourse (*i. e.*, such retirement is not valid).

1400. (500.) And in all cases in which retirement is valid, if the husband divorces his wife, he shall not be entitled to revoke the divorce (because the woman shall be treated, for this particular purpose, as if the husband has not had intercourse with her, the rule being that if the husband divorces his wife without intercourse with her, the divorce is not revokable : for other purposes, such as liability to dower, a valid retirement is equivalent to intercourse).

And after a retirement has become valid, she shall be entitled to full dower, although the wife might admit that the husband had no sexual intercourse with her, according to *Zahir-i-Ruwayet*. (See Fatawai Alumgiree, Vol. I, page 431, line 18. And our *Ashabs* [Aboo Haneefa, Aboo Yusoof and Mahomed] have held that *Khilwut-i-Suheeh*, or valid retirement, takes the place of sexual intercourse in regard to some matters and not in regard to other matters. They have held that a valid retirement takes the place of sexual-intercourse in regard to the perfection of the wife's right to her dower, and in regard to the establishment of *Nusub*, or paternity [even if the husband has had no actual intercourse, provided the retirement is valid], and in regard to the obligation to observe *Iddut* and to get maintenance [that is, if after a valid retirement, the husband divorces the wife, then she must observe *Iddut*, and must be maintained during the *Iddut*], and in regard to the prohibition of the marriage of her sister [that is, if the husband has a valid retirement with his wife, and he then divorces her, and she consequently observes the *Iddut*, then, during the period of this *Iddut*, the husband cannot lawfully marry her sister], and in regard to the prohibition of four women besides her [that is, during her *Iddut* he cannot marry other four women], and in regard to the prohibition of the marriage of a slave-girl [that is, if a man has married a free woman, and after a valid retirement he divorces her, and the wife is consequently observing her *Iddut*, the husband cannot, during the *Iddut*, marry a slave-girl], according to analogy from the view of Aboo Haneefa, on whom be peace : and in regard to the selection of the fitting period for divorce [that is, the husband shall divorce

her in that period of purity in which there was no valid retirement]. But they have not held valid retirement as taking the place of sexual intercourse in regard to the parties being rendered *Moohsin*. [محصن, *Moohsin* is a man who has had sexual intercourse even once in a validly married state, and is, therefore, subject to a very severe punishment in case of *Zina*, or adultery]; and in regard to the establishment of prohibition between the husband and the daughter of the wife [that is, by sexual intercourse after marriage, the wife's daughter becomes unlawful to the husband, but not by valid retirement alone], and not for the purpose that the wife shall be rendered fit for being married to a prior husband; and not for the purpose of enabling the husband to revoke his divorce, and not for the purpose of establishing rights of inheritance [that is, if the husband has sexual intercourse and he then divorces his wife, and during the *Iddut* either party dies, then the other would inherit; but if there has been only a valid retirement, then they have no rights of inheritance]).

1401. (501.) If an infidel has retired with his wife after she has embraced Islam (the marriage having taken place whilst they were infidels) the retirement shall be valid; and if the infidel (husband) embraces Islam, his wife being still an infidel, and the husband retires with her, the retirement is not valid. (When one of the two parties becomes a Moslem, then the other shall also be asked to accept the Islam; and in the event of refusal, their marriage, contracted whilst in the state of infidelism, becomes *Fuskh*, or cancelled. Therefore, when the husband remains an infidel and the wife alone becomes a Moslem, the retirement, after her acceptance of Islam, is valid, because there is no preventive cause, the husband being still an infidel does not recognise or realise the cancellation of his marriage. But if the husband becomes a Moslem, and the wife still remains an infidel, then the retirement is not valid; because the husband is bound to know that the marriage has been cancelled, and, therefore, the retirement has been without the relationship of husband and wife under the law).

1402. (502.) And in all cases in which the retirement is invalid, although the husband has ability to have actual intercourse, if the husband divorces his wife (after such retirement), she shall be liable to *Iddut*, by analogy; but if the husband has not ability for actual intercourse, she shall not be liable to observe *Iddut*.

1403. (503.) If the husband says, "If I marry so and so and retire with her, she is divorced," and he marries her and retires with her, he

shall be liable to half the dower (although the retirement might be valid); and verily have we discussed this before. (See paragraph 486). God knows best!

SECTION VI.

On the difference between husband and wife as regards dower.

1404. (504.) When the husband and wife disagree regarding the amount of dower, during the continuance of the marriage, then, according to Aboo Haneefa and Mahomed, on whom be peace, the proper dower shall be regarded as the test. Therefore, if the proper dower testifies to (or supports and confirms and is in keeping with) what one of the two parties alleges, then the word to be accepted shall be the word of that party with his (or her) oath (that is, in the absence of proof, or witnesses), as against the claim of the other party.

Thus, if the husband says, the dower is one thousand, whereas the wife says, it is two thousand, but the proper dower is one thousand or less; then the word to be accepted shall be that of the husband, with his oath (that is, in the absence of witnesses); thus:—"I swear by God that I did not marry her for two thousand dirhems;" but if he refuses to take the oath, then the higher amount shall be established; whereas if he takes the oath, the higher amount shall not be established: and whoever establishes (*byyuna*, or) proof by witnesses, decree shall be made in his (or her) favor; and if both the husband and the wife establish proof by witnesses, the decree shall be made according to the wife's proof by witnesses. But if her proper dower is two thousand, or more than that, then (the dispute being as aforesaid) the word to be accepted shall be that of the wife, with her oath, thus: "I swear by God I did not marry for one thousand;" but if she refuses to take the oath, then the one thousand shall be established; and if she takes the oath, then she shall be entitled to the two thousand, in this way, that she shall get one thousand as admittedly fixed, the husband having no option in that thousand (to give either the dirhems, or anything else by way of substitution for the same), and one thousand because the proper dower testifies to (or supports and confirms) the same; and as regards this (latter) thousand, the husband shall have the option either to pay in dirhems, if he likes, or in deenars (equivalent to one thousand direhms). And whoever establishes (*byyuna* or) proof by witnesses, decree shall be made

according to such proof by witnesses; and if both parties shall establish proof by witnesses, decree shall be made according to the husband's proof by witnesses.

But if the proper dower is one thousand and five hundred, then (the dispute being as aforesaid) both of them shall be put on their oath; and if the husband refuses to take the oath, he shall be liable for two thousand, as having been fixed at the marriage; and if the wife refuses to take the oath, one thousand shall be decreed; but if both of them take the oath, then one thousand shall be decreed, as having been fixed at the marriage, and five hundred, as having been testified to (or supported and confirmed) by the proper dower, and the husband shall be given the option as regards the (same) five hundred (either to pay in dirhems or deenars): and whoever establishes (*byyuna* or) proof by witnesses, his (or her) proof by witnesses shall be accepted; and if both of them establish proof by witnesses, then one thousand and five hundred shall be decreed—one thousand as having been fixed by marriage, and five hundred by way of proper dower.

1405. (505.) And if the husband and wife disagree in the matter of dower, after divorce before intercourse, then, according to Aboo Haneefa and Mahomed, the Kazee shall pay regard to the *Mootat* of a similar woman: then whichever of the two is testified to (or supported and confirmed) by the said *Mootat*, his (or her) word shall be accepted with his (or her) oath against the claim of the other: and if the *Mootat* supports an amount of dower which is at the middle of the amounts alleged by the parties (that is to say, which is the mean of the amounts alleged by the two parties), then both of them shall take the oath, according to the ruling in the Jamai Kubeer, and according to the ruling in the Jamai Sagheer, the word to be accepted is that of the husband, with his oath: and Aboo Yusoof, on whom be peace, says, that the husband's word shall be accepted in all cases (that is, in all three cases, when the *Mootat* is proportionate to, and therefore confirms the husband's allegation or the wife's allegation, or when it supports neither to the fullest extent, but supports a middle course) except when the husband makes a grossly absurd allegation (*Moostunkir*). And there is a difference of opinion as regards what is a grossly absurd allegation (*Moostunkir*): Hussun, son of Zyad, on whom be peace, says, that a grossly absurd allegation is, where the proper dower is ten thousand dirhems and the husband claims the *Nikah* for ten (dirhems); and Saad, son of Maáz, of Merv, says a grossly absurd allegation is, where the man says, "I married her for wine, or a pig;" and some of the lawyers have said, a grossly absurd

allegation is, where the husband claims to have married for what, according to practice (or custom), he could not have married a woman similar to her: and this view is reliable.

1406. (506.) And if the husband and wife differ as regards the fact of dower (not as regards the amount, the rules regarding which have been already discussed in the previous paragraphs); one party claiming that dower was fixed, and the other denying this fact, then the word to be accepted shall be that of the party denying (with his oath), and the Kazee shall decree the woman her proper dower.

And similar to this rule, is the rule, in all the details set forth, where the husband and wife differ (as to fact of dower) before divorce.

1407. (507.) And if one of the parties dies, and the difference arises between the survivor and the heirs of the deceased, then this case is similar to the case where the parties themselves differ during their lifetime.

And if both the husband and wife have died, and their heirs (respectively) differ as regards the amount of the dower which was fixed (and no party has witnesses), then Aboo Haneefa, on whom be peace, says, the word to be accepted is that of the husband's heirs (with oath), whether (their word affirms) a large or a small (dower); and Aboo Yusoof, on whom be peace, says, that the word to be accepted is that of the husband's heirs, unless they make a statement which is grossly absurd (*Moostunkir*); and Mahomed, on whom be peace, says, that the proper dower shall be taken as the test.

And if their heirs (respectively) differ as regards the fact of dower (*i.e.*, whether any dower was at all fixed), then the word to be accepted shall (according to all the three Imams) be that of the party denying that dower was at all fixed (that is, with oath, in the absence of witnesses); but according to Aboo Haneefa, the Kazee shall not decree any dower at all (not even the proper dower) to the heirs of the wife; but Yusoof and Mahomed, on whom be peace, say, that the Kazee shall decree the proper dower; and the learned lawyers have held that the Fatawa is given according to the view of Yusoof and Mahomed aforesaid.

1408. (508.) And if a man marries a woman, the dower being a particular slave, who dies before delivery, and they differ as to the price of the slave, the word to be accepted is that of the husband (with his oath, in the absence of witnesses).

And so also if he marries her for a particular cloth, and the cloth is

destroyed before delivery, and they differ as to its price, the word to be accepted is that of the husband.

And so also if he marries her for a vessel of silver or of gold, which is destroyed before delivery, and they differ regarding its weight, then the word to be accepted is that of the husband, in this case.

(*Note.*—In these cases, where the dower fixed is admittedly a thing in particular, proper dower is not the test of its value: and it is also noteworthy that the thing must not be of less value than ten dirhems).

1409. (509.) And if a man marries a woman for a particular cloth, of which the value (at the time of the marriage) is ten dirhems; but according to the market rate the value of the cloth is reduced to eight dirhems (after marriage and before delivery), she shall be entitled to the cloth and nothing else. And if the price of the cloth on the day of marriage is eight dirhems, but the market rate (subsequently) rises, and the price of the cloth becomes ten dirhems (at the time of the delivery), then she shall be entitled to the cloth and two dirhems (if the cloth was valued at eight dirhems, and the price remained the same, then she would be entitled to the cloth and two dirhems, to make up ten dirhems, which is the lowest dower; and if the price subsequently increases, she is still entitled to the two dirhems, because increase in the market rate after marriage is not to be regarded, and the dower must be ten dirhems: if at the time of marriage the price of the cloth was eleven dirhems, and subsequently the price become fifteen dirhems, she shall still be entitled to the cloth alone).

But if the price of the cloth (at the time of the marriage) is a hundred dirhems, but the price of it gets reduced before delivery, and becomes five dirhems, (*i.e.*, less than ten) the woman shall have the option, if she likes, to take the cloth as reduced in value, or if she likes she might take the price of the cloth as at the time of the marriage.

1410. (510.) And if the woman says, "Thou didst marry me, fixing as dower thy male slave—this (here);" and the man says, "I married thee, fixing as dower my female slave—this here:" but the female slave (so pointed out) is the mother of the woman; then if both parties establish proof by witnesses (*byyuna*), the proof by witnesses offered by the woman shall be accepted; because the proof by witnesses offered by the woman has, for its object, the establishment of her own right (that is, the dower, which is her property); and the proof by witnesses, offered by the man, has for its object the establishment of the right of a different person (*viz.*, the wife). But the female slave (that is, the mother of the wife) shall become free, as

against the husband, on account of his admission (that is, the husband having alleged, though it might turn out falsely, that the slave-girl was given by him as dower, that slave-girl becomes the property of the wife; and the rule being that, if the daughter shall happen to be the owner of her mother, then the mother shall become free, the mother becomes free by the particular admission of the man).

1411. (511.) And if the husband establishes proof by witness (*byyuna*) that he married his wife for a thousand dirhems, and the woman establishes proof by witnesses that he married her for a hundred deenars, and the father of the woman, he being the slave of the husband, establishes proof by witnesses, that the husband married the woman, fixing as her dower that slave; then the proof by witnesses, which is to be accepted, is that adduced by the father of the woman; and if the woman's mother, who is the female slave of the husband, establishes, along with the proof by witnesses established by the father of the woman, proof by witnesses, to the effect that the husband married her daughter, fixing the mother as dower, then the proof by witnesses to be accepted is that established by the father and the mother, and it shall be held that a moiety of the father and a moiety of the mother, both together, formed the dower of the woman (the consequence being that, firstly, the moiety of the father and the mother, which thus came to be owned by the woman, became free, and therefore, according to Aboo Haneefa, their entirety became free; because you cannot have one-half of a person as slave, and the other half as free), and the father and mother shall exert themselves for the benefit of the husband, to reimburse him for a moiety of their value.

But if this does not take place (that is, if the father and the mother do not produce their proofs, along with the proofs adduced by the husband and wife), but the woman establishes proof by witnesses, to the effect that the husband married her for one hundred deenars, and the husband establishes proof by witnesses, to the effect that he married her for a thousand dirhems, then the Kazee shall decree in accordance with the proof by witnesses established by the woman (and find) that the marriage took place for a hundred deenars; and if after this decree of the Kazee, the woman's father, who is the slave of the husband, establishes proof by witnesses, to the effect that the husband had married the woman, fixing the father as her dower, then the Kazee shall set aside his first decree and shall decree that the father was fixed as the dower.

1412. (512.) And if the father claims that he married the woman,

fixing her father (who was the husband's slave) as her dower, and the father confirms the husband in this matter, and the husband also establishes proof by witnesses to the same effect; and the woman claims that he married her for a hundred deenars, but she does not establish proof by witnesses, and the Kazee decrees according to the proof by witnesses established by the father and the husband, and orders that the father is the dower and makes him free, as against her property, and gives the *Willa* of the father to the woman; and if after all this the woman establishes proof by witnesses, to the effect that the husband married her for a hundred deenars; then the proof by witnesses to be accepted shall be that adduced by the woman, and the Kazee shall decree a hundred deenars in her favor, against the husband, and shall render the father of the woman free as against the property of the husband, but he shall set aside the *Willa* (of the father) which he had decreed in favor of the woman; because the father became free by the admission of the husband, before the Kazee decreed the freedom of the father; therefore the Kazee, in effect (only), decreed the *Willa*, and not the freedom (because freedom was established by the husband's admission before the decree); and for this reason (that is, what the Kazee had decreed was merely the *Willa*, and not freedom), the *Willa* became void by the proof by witnesses established by the woman after this (that is, after the decree of the Kazee). God knows best!

SECTION VII.

ON THE DIFFERENCE BETWEEN HUSBAND AND WIFE AS REGARDS THE FURNITURE OF THE ROOM (OR HOUSE).

1413. (513.) The Mashaikhs have differed regarding the rules in this matter, entertaining nine different views.

1414. (514.) Aboo Haneefa and Mahomed, on whom be peace, have said that, when the husband and wife differ as regards the furniture (or things) to be found in the room (or house) in which they live, during the subsistence of the marriage, or after separation caused either by reason of an act proceeding from the husband or proceeding from the wife, then whatever, according to practice (or usage), appertains to a female such as the under garment (of a woman) and the head tie, and the spinning wheel, and the box and other like things, shall belong to the wife, except when the husband establishes proof by witnesses regarding the same; and whatever appertains to males (according to usage and custom), such as weapons,

coats, hats, and the *kummurband* (or waistband), and horse, and such like things, shall belong to the husband, except when the woman establishes proof by witnesses regarding the same; and whatever might appertain to both men and women (by custom and usage)—such as a slave or a servitor, bed clothes, goats and cattle—the same shall belong to the man, except when the woman establishes proof by witnesses regarding the same. And Aboo Yusoof, on whom be peace, says, that (in the last case), to the wife shall be assigned the things (*Jahez*, or dowry endowed by the bride's father as marriage presents) which a woman like her brings from her own father or other relation, and the rest shall belong to the man (*i.e.*, the husband).

1415. (515.) And if the husband dies, leaving his wife him surviving, and the difference arises between the wife and the heir of the husband (in regard to the furniture in the house); then, as regards what appertains to males according to habit (or usage), the word to be accepted is that of the heir (with oath, in the absence of witnesses), and the rest shall belong to the woman.

But if the woman dies, leaving her husband her surviving (and the difference arises between the wife's heir and the husband), then as regards what appertains to females (according to habit and usage), the word to be accepted shall be the word of the wife's heir (and that which appertains to males, according to usage, shall belong to the husband), and the rest of the property, which may be such that in regard to which a doubt might exist (whether, according to custom and usage, it is for the use of the man or the woman), shall belong to the survivor of the two, who is the husband.

Aboo Yusoof, on whom be peace, says, that the rule in a case arising after the death of one of the parties is the same as that which governs the case during their lifetime.

1416. (516.) And if one of the parties is free and the other is owned by somebody else (*Mumlook*), whether (that other being a slave of any of the descriptions known to law), he is such that he has no power to transact business in his or her own right (*Muhjoor*), or has permission for such business (*Mazoon*), or is a *Mookatub*; then the whole of the property shall belong to the person who is out of them free, whichever of the two might be the free person.

And Aboo Yusoof and Mahomed, on whom be peace, who together are called (*Sahibain*) have said that if the party who is owned by somebody else (*Mumlook*), is deprived of the power to transact business in his or her own

right (*Muhjoor*), then the rule is as above stated (*viz.*, that the property shall belong to the person who is free); but if he or she has got permission to transact business (*Mazoon*), or if he or she is a *Mookatub*, then the rule is the same as that which governs the case where both parties are free persons (that is, what usually belongs to males shall go to the husband, and so forth).

1417. (517.) And if one of the two parties is a Moslem, and the other is an infidel (*e.g.*, if the husband is a Moslem and the wife is a *Kitabya*) then this case and the case where both parties are Moslems are alike.

1418. (518.) And if one of the parties is a minor, and the other is an adult, or if both of them are minors, then, according to some of the traditions, both parties shall be treated on an equal footing (and the minor shall not be considered as having a smaller right); and in some of the traditions it is said that if the husband has attained majority, and the wife, although a minor, has reached the age when intercourse may be had with her, then (and not in other cases) this case and the case where both of them are adults are alike.

1419. (519.) And there is no difference as regards these rules between the husband and the wife, whether the room in which they live is the property of the husband or the property of the wife.

1420. (520.) And if some person, other than the wife, is being maintained by one (of two persons), as, for instance, when the son is being maintained by the father, or the father is being maintained by the son, and the like instances, then the property, in cases of doubt, (when the dispute arises between the maintainer and the maintained), shall belong to the person who maintains (according to the view of all the three Imams), as is mentioned in the Kysaneeat and the Nawadir of Ibn-i-Roostum.

1421. (521.) And if a man has four wives, and a difference arises between him (on the one hand) and them (on the other hand), as regards property; then if the wives live in one room, then such property as is befitting females (that is, such property as, according to usage, is peculiarly used by females) shall belong to them jointly; and if each of them occupies a different room, then the things in each of the rooms shall belong to the man and to the particular woman, in the manner (that is, according to the rules) set forth above regarding spouses, and one woman shall not share with any other woman in regard to those things (in the particular room); because none of the women is in possession of what is in the room of another

woman, and therefore she is not entitled to the same, unless she adduces proof by witnesses.

1422. (522.) And if a woman claims property on the allegation that she purchased the same from her husband, then the property shall belong to the husband and she shall have to establish proof by witnesses.

1423. (523.) And if the husband dies, and his heir says to his wife, "Verily, did my father divorce thee thrice whilst he was in health," intending thereby to obtain the property to the detriment of the woman: his word shall not be accepted unless supported by proof by witnesses. And the property shall belong to the woman, according to Aboo Haneefa, on whom be peace; because, according to him, property, of which the ownership is doubtful, (whether it belonged to the husband or is the wife's property), shall belong to the survivor (of the spouses), and therefore her word shall be accepted, with her oath, to the effect,—"I swear by God I do not know that my husband divorced me;" therefore if she refuses to take oath, or if she admits (that she was divorced whilst the husband was in health), then the property of which the ownership is doubtful, shall belong to the heir; in the same way as in a case where between husband and wife, there happens to be a dispute after divorce (when property of doubtful ownership belongs to the husband).

1424. (524.) And if the husband divorces his wife whilst he is sick, and the husband then dies after the expiry of the wife's *Iddut*, then the property of doubtful ownership (in the event of conflicting claims of exclusive ownership) shall belong to the heir of the husband, because she became a stranger (by reason of the divorce which was pronounced by the husband, and which was effective) and possession did not remain with her (because by reason of the divorce she became a stranger, and a stranger can have no possession); but if the husband dies before the expiry of the *Iddut*, then, according to Aboo Haneefa, on whom be peace, the property of doubtful nature shall belong to the woman, because (by reason of the husband's death before *Iddut*, the relationship of husband and wife was not dissolved and) she is entitled to inherit from him, and does not become a stranger; and the husband's death during the *Iddut* has the same effect as if he died before divorce (that is, without any divorce at all, and the heirs will get nothing).

1425. (525.) And if the husband and wife differ as regards the room (or house itself) in which they live, and each claims the room to

belong to him or to her; then in this matter the word to [illegible], if he requested of the husband (because *primâ facie* the wife lives in the [illegible]ad shall belong owned by the husband); but if the woman establishes pr[illegible]m him, because or if both of them establish such proof, then a decree [illegible]ention of wages, accordance with the proof, by witnesses, adduced by the [illegible]p (and there is [illegible] she virtually had no possession (in her own right, the [illegible]sumption being in favor of the husband's possession, and the rule is that, so far as oath is concerned, the oath of the party making a *prima facie* true statament is to be believed; and as regards proof by witnesses, the rule is that such proof adduced by the party against whom apparent circumstances testify, shall be accepted).

1426. (526.) And if a house (or *dar*) is in the possession of a man and a woman, and the woman establishes proof by witnesses (*byyuna*) that the house belongs to her, and that the man is her slave; and the man establishes proof by witnesses that the house belongs to him, and that the woman was married to him for a thousand dirhems, which he has already paid to her; but he does not establish proof by witnesses that he is a free man; then the Kazee shall decree that the house and the man both belong to the woman, and that there is no marriage between them; because the woman established proof by witnesses that the man was her slave, and the man did not establish proof by witnesses that he was a free man; the Kazee will, therefore, decree that the man is (her) slave; and when he has been decreed by the Kazee to be a slave, then the proof by witnesses established by him becomes necessarily void in regard to his ownership of the house (because a slave cannot own property in his own right), and in regard to his (pretension of) marriage (because a slave cannot marry his mistress or owner); but if the man establishes proof by witnesses that he is a free man initially (*i.e.*, has always been a free man and never a slave) and the rest of the case is as aforestated, then the Kazee shall decree that he is a free man, and that he married the woman; but he will decree the house to the woman, because when we decreed (*i.e.*, when the Kazee has decreed) in favor of the marriage, then the man became, as regards the house, the master of possession, and the woman goes out of possession (and therefore her *byyuna*, which is to prove what is contrary to presumption, shall be accepted); thus the Kazee shall decree the house in her favor; just as if the husband and wife differ as regards a house, which is in possession of both, then the house shall (in this case) belong to the husband, according to Aboo Haneefa and Aboo Yusoof, on whom be peace (in the absence

woman, and there the trial is had on the oath of the husband); but if proof by witnesses establish proof by witnesses, then the Kazee shall decree proof by witnesses adduced by the woman.

1422. (522.) And if the man and woman (that is, the husband and the she purchased the wards furniture which (apparently) belongs to the woman, and both of them and establish proof by witnesses, the Kazee shall decree in favor of the husband: and if they differ as regards the furniture above-stated, and as regards the fact of marriage (the husband affirming and the woman denying the marriage), and the woman establishes proof by witnesses that the furniture belongs to her, and that the man is her slave, and the man establishes proof by witnesses to the effect that the property belongs to him, and that he married the woman for a thousand, which he has already paid her, then the Kazee shall decree as regards the man, that he is her slave (because the man did not establish *byyuna*, that he was a free man) and also that the property belongs to her, just as we have laid down in the case of a house. (See paragraph 526). But if the man establishes proof by witnesses to the effect that he is initially free (that is, that he has always been a free man), the Kazee shall decree in favor of his freedom, and that the woman is his wife, and that the property belongs to him; because (that is, the reason for the property being decreed to him is this), the man, in regard to property which apparently belongs to females, is driven (in order to succeed) to the necessity of establishing proof by witnesses.

But if (in the same case) the property is of a doubtful nature, so that it might belong to males as well as to females, then the Kazee shall (when the husband's *byyuna* relates to his freedom and to the fact that the property belongs to him, and that he had married the woman, and the wife establishes *byyuna* that the man is her slave, and that the property belongs to her) decree in favor of the husband's freedom, and shall also decree that the woman is his wife; but he shall decree the property to the wife, because the proof by witnesses adduced by the woman, in regard to property of a dubious nature, is preferable, because the woman is out of possession.

1428. (528.) When a woman spins cotton belonging to her husband and then they differ as regards the thread, such a dispute taking place either before separation between the husband and the wife, or afterwards; then the case revolves itself into various shapes: either the husband had requested (or permitted) her to spin, or he had told her not to spin, or he had

neither made such a request nor told her not to spin; then, if he requested her to spin, telling her "spin the cotton for me," the thread shall belong to the husband, and she shall be entitled to no wages from him, because when the husband asked her to spin, without making mention of wages, then this amounted to a request on his part for her help (and there is no payment for the help of a mate); but if he made mention of wages to her, then if he fixed a definite amount on account of such wages, she shall be entitled to the amount fixed, because he hired her for definite wages in respect of an act which he was not entitled, as of right, to have done by her; but if he mentioned indefinite (or unknown) wages, or made it a condition that the thread or cloth shall belong to both, the thread shall belong to the husband, and she shall be entitled to wages such as similar women are entitled to (for such work); because he hired a portion of her active labor (and must therefore pay for that portion of the active labor at the rate at which such work is done by one like her, the wages not having been previously fixed with her): therefore this case that is, the wife's spinning the thread under such circumstances, the wages not having (been mentioned) is (as regards the amount of wages to be ascertained) similar to where the hire becomes due to the person who being a mill-owner has supplied the use of his own measure (to a customer) for ascertaining the weight (of grain belonging to the customer, when hire for the use of the measure, and for the labor done in finding out the weight of the grain, will have to be paid for at the usual rate, although the hire was not fixed beforehand).

And this case is also similar to the case where the thread has been given to a weaver to weave cloth for half (that is, the wages were fixed either at half of the thread or half of the cloth, in which case the wages will be the wages for similar work, and not necessarily the half stipulated for).

And if they differ in regard to the (fact of) wages, the woman saying that she spun the thread for wages, and the husband saying that there was no understanding for the payment of wages, then the word to be accepted shall be that of the husband with his oath (that is, in the absence of witnesses); because the husband denies the hire and the wages.

But if the husband says, "spin the cotton for thyself," then the thread shall belong to the woman, and the husband will not be entitled to get anything from the wife (that is, neither the thread nor the value of the cotton); because the husband (must be presumed to have) made a gift of the cotton to her.

And if they differ, the husband saying, "I requested thee to spin the cotton for me;" the woman saying, "No; on the other hand, thou didst say to me, 'spin the cotton for thyself;'" then the word to be accepted is that of the husband, because the request (or permission) proceeds from the husband (and the question is, whether such request was of the nature contended for by the husband or that contended for by the wife): and therefore the word to be accepted will be that of the husband on his oath; but if he says, "spin the cotton so that the thread might be for both," then the thread shall belong to the husband, and she shall be entitled to wages for a similar work; and we have mentioned this before (in this very paragraph): and if the husband says to her, "spin the cotton" without adding anything further, then the thread shall belong to the husband, because apparently the husband means that he wants the thread for himself (and there will be no wages, because the wife rendered mere assistance to the husband).

And if the husband told his wife not to spin the thread, and the woman (in spite of this) spins the thread, she shall be entitled to the thread, but she shall be liable to make over similar cotton to her husband, because she spun the thread by way of usurpation, and will therefore be bound to make over similar cotton by way of compensation; just as if a person usurps another's wheat and reduces it to flour by means of the mill, the flour shall belong to the usurper, who shall be bound to return similar wheat.

And if they differ, the husband, the owner of the cotton, saying, "thou didst spin with my permission," the woman saying, "I spun it without thy permission;" then the word to be accepted is that of the owner of the cotton, because the woman claimed to be the owner of the cotton (by having spun the cotton which she usurped), and the husband denies the same.

And if the husband brings the cotton to his room (*i. e.*, brings home the cotton from the market) without saying anything (to the wife, whether or not she was to spin it), and the woman spins the cotton; then if the husband is in the habit of selling cotton (that is, if his business is to sell cotton) the thread shall belong to the woman who shall be bound to return similar cotton, because, apparently, the husband purchased the cotton for the purpose of selling the same; but if he is not in the habit of selling cotton, then if the husband claims to have given permission to the wife (to spin the cotton), the word to be accepted shall be his word, because he apparently meant, by taking the cotton to his room (that is, by bringing the cotton home from the market), that the woman should spin it; the per-

mission shall therefore be established constructively (and the thread shall belong to the husband, and the wife shall be entitled to no wages, having rendered assistance out of kindness, as a matter coming within the relationship of husband and wife) just as if the wife were to prepare a dish out of meat brought by the husband, in which case the dish of meat shall belong to the husband: and (the husband's word, with his oath, shall be accepted) because the husband, in this case (*i.e.*, when he does not sell the cotton habitually), claims to have given the permission, and the woman claims to be the owner of the cotton (by having usurped it, and then converted it) and this the husband denies (*i.e.*, he denies the circumstances which lead to the wife's ownership).

And, similarly, if the husband and wife differ in regard to the cloth, the husband saying, "Thou didst give the thread to the weaver with my permission, in order that the weaver might weave cloth out of the thread," the woman saying, "I gave the thread to the weaver without thy permission," the word to be accepted shall be that of the husband.

If the woman spins the cotton of her husband with his permission, and if they usually sell the cloth by having the same prepared from thread, and from the proceeds thereof (*i.e.*, of the cloth) purchase things for their necessity, and if, as regards the cloth (in question), they use a portion thereof for household clothing (and a portion they sell as aforesaid); then whatever clothing has been made from that cloth, and whatever has been purchased from the proceeds thereof, shall belong to the husband; because the woman acts for the husband, and therefore, those things (household clothing, etc.) shall belong to the husband, except things which the husband has (firstly) purchased for the wife, and (secondly) said at the time of the purchase that he was purchasing the same for the wife, or which are known by practice to be for her, and (thirdly) which have been made over to her; these shall belong to her.

A man used to give to his wife what is generally necessary, and also used to give her at times some dirhems, and used to say, "purchase therewith cotton and spin thread out of it;" and the woman used to purchase cotton and spin thread out of it, and she then used to sell the thread and purchase things (or furniture) for the room with the proceeds thereof; then the things shall belong to the woman; because she purchased those things without being appointed Vakeel on behalf of the husband, for the purpose of making the purchase (on behalf of the husband); therefore, she shall be considered to have purchased the things for herself. God knows best!

CHAPTER IV.

SECTION I.

ON CLAIMS REGARDING MARRIAGE.

1429. (529.) A woman makes a claim against a man that he married her; the man denies the claim: he shall be made to take an oath (as follows):—"I swear by God she is not my wife; and if she is my wife, then she is divorced irrevocably." The husband is made to take the oath because, according to Aboo Yusoof and Mahomed, on whom be peace, the husband can have an oath administered to him in matters relating to marriage, and Futwa is given according to their view (whereas, according to Aboo Haneefa, no oath is to be administered to the spouses in the matter of a marriage; and therefore, when the husband denies the fact of marriage, oath shall not be administered to him; because if he, on oath, says he did not marry her, then, according to the rules, his word shall be given effect to; but it may be that there was a marriage between them, and the husband has forsworn himself, in which case the woman is not entitled to marry another person; because the husband's denial of marriage, if there was a marriage, does not amount to a divorce; and if he refuses to take oath, then the Kazee shall uphold the woman's word, and the relation of husband and wife shall continue to subsist; but it may be that there was no marriage, in which case the connexion would be that of *Zina*, and therefore it is safe that there should be no rule for administering oaths to the parties, and the matter should be decided on the *byyuna*, which is not open to the above objection, as there is no chance of failure when trial is had with the *byyuna*); but (be it observed, by way of parenthesis) all the learned lawyers have held by *Ijma*, or concurrence, that after an irreversible divorce, or after death, oath may be administered (that is, that there shall be no objection to oath being administered in these cases) in the matter of marriage (as in the case where the wife says, she was married by the husband who has given her an irreversible divorce, and, therefore, she is entitled to her dower, and the husband says, he never married her; in this case oath will be administered to him, because, if the husband says, on oath, he never married her, she is not entitled to the dower claimed,

and if the husband refuses to take oath, then the wife shall be entitled to the dower: so also if the wife dies, or the husband dies, and the wife's heirs, or the wife claims the marriage, and the husband or his heirs deny the claim, oath shall be administered to the party making the denial) on account of property being involved in the question.

And the oath shall be administered in this particular form; because if she is truthful, the marriage is not rendered void by the husband's denial of the marriage (without a divorce), and if the husband swears (saying *only*, "this woman is not my wife"), the wife would remain in a state of suspense (without being at liberty to marry again, because if his denial is false, the marriage would still be subsisting; but if he, in addition to swearing that he never married her, also goes on to say, "and if I ever married her she is divorced irrevocably," then, even if the denial of marriage is false, the woman is no longer his wife by reason of the divorce now pronounced).

And some of the learned lawyers have said that the husband will have to swear to a mere denial of the marriage (*without adding the clause* regarding the conditional divorce); and when he shall have taken such an oath, the Kazee shall say, "I have separated you two" (thus, even if the denial is false, the relationship of husband and wife ceases by the decree of the Kazee, and the wife no longer remains in a state of suspense).

1430. (530.) A man marries a woman, the marriage being witnessed by two men; the woman denies the marriage, and marries another man; and the witnesses die: then, according to the view taken by all the three Imams, the (first) husband cannot put the woman on her oath; because the giving of oath is prescribed by law in the hope of bringing about a refusal to take oath (but here there is no place for the realization of that hope, because if there was, in reality, no marriage, she would not refuse to take oath, and if there was, in reality, a marriage, then she having, in spite of it, contracted a second marriage, there is still no hope that she would refuse to take oath, having taken on herself the consequences of a more serious sin); and if (before the Kazee) she admits the fact of the first marriage, her admission shall not be valid to the detriment of the second husband; therefore, the first husband shall not be put on his oath; but the second husband shall be put on his oath (regarding the fact of the first marriage); and if he (the second husband) takes oath, the dispute comes to an end (that is, the claim of the first husband shall then be decided against that husband); but if the second husband refuses to take the oath,

then that denial shall amount to an admission in favour of the first marriage; and in this case (*i.e.*, when the second husband denies), the woman shall be put on her oath (as regards her first marriage); and if she takes the oath, the first marriage shall not be proved, and if she refuses to take the oath, the Kazee shall decree her to the first husband.

1431. (531.) Two men claim each to have married one and the same woman, who denies having married either of them; then whichever of the two men establishes proof by witnesses (*byyuna*), the Kazee shall decree the woman to him; but if both of them establish proof by witnesses, and the woman is in the hands of neither, then both the proofs by witnesses adduced shall be void; because the marriage does not admit of being good for both of them in partnership, both being alive, and neither of them could be preferred to the other (both being out of possession).

And if each of them establishes proof by witnesses, to the effect that the woman belongs to him, and if the woman is in the hands of one of them, then the Kazee shall decree her to the man in possession.

And so also if each of them establishes proof by witnesses (regarding marriage) and one of them claims to have had intercourse, and his witnesses prove both marriage and intercourse (and the other party only proves marriage and does not prove intercourse), the Kazee shall decree the wife in favor of the latter.

And if both of them establish proof by witnesses regarding marriage and intercourse, the Kazee shall not decree the woman to either of them.

And if both of them claim marriage, and one of them fixes the time (of the marriage), and his witnesses testify to the marriage and the time, then he is to be preferred; and if one of them fixes the time (of marriage), and the other does not fix the time, but the woman is in the hands of that other, who does not fix the time, the Kazee shall decree the woman to the man in possession.

And so also if one of them fixes the time of the marriage and the other does not fix the time, but the man who does not fix the time, establishes proof by witnesses regarding the fact of the marriage, and (also) intercourse, then the latter is to be preferred.

And if both of them fix the time, and one of them is prior (that is, he fixes a time for marriage which is anterior to that assigned by the other) then the man, who is prior in point of time is to be preferred in every way (whether the woman is in possession of the other or if the other proves intercourse).

And if both of them establish proof by witnesses regarding marriage, and neither of them fixes the time of the marriage; then, if (after both of them have brought witnesses) the woman admits marriage with one of them, the Kazee shall decree her to the man in whose favor the admission is made; and if both establish proof by witnesses regarding the marriage, whilst the woman admits (*i.e.*, she has from the beginning been asserting) that she is the wife of one of them: then there is a difference as to what should be done in this case: some have held that the woman shall not be decreed to the person in whose favor she has made the admission, because admission (by the woman of the fact to be proved against her by one husband) before proof by witnesses has been adduced by the husband (in whose favor the admission is made) renders that proof void (that is makes that proof wholly unnecessary, inasmuch as the woman admits the fact to be proved); therefore the Kazee shall not make a decree (on the faith of such an admission made before proof by witnesses has been established by either party) unless the admission is made after proof by witnesses has been established (and in the latter case he shall act on such admission). And some have said that the Kazee shall decree her to the person in whose favor she has made the admission; because the admission of the woman in favor of one of the two husbands is tantamount to possession by that husband: because if both of them have established proof by witnesses, whilst she is in the hands of one of them, the Kazee shall decree her to the man in whose hands she is.

And if the woman is in the hands of one of them, and his witnesses testify that she is his wife, or testify that she is his married wife, or lawful to him (*i.e.*, the witnesses, instead of proving the fact of marriage, prove the result of marriage), whilst the witnesses of the other husband testify that he married the woman: the learned lawyers have differed in this matter; some have held that the proof by witnesses adduced by the husband, in whose hands the woman is, shall not be accepted; because the proof by witnesses adduced by the man in possession is preferred to such proof adduced by one not in possession, only when the witnesses testify to the cause (*e.g.*, marriage, which is the cause of coverture); but if they testify in the way mentioned above, then this amounts to evidence of a general right, and therefore the proof by witnesses adduced by the man in possession shall not be accepted; but some of them have said that the same shall be accepted; because the evidence of witnesses to the effect that the woman is his wife, or his married wife, or is lawful to him, amounts to

proving the cause (the marriage), because a woman does not become married and lawful, except by a certain cause, and that cause is marriage; and if the effect (or result) is connected with a certain cause (and not with any other cause), then the mention of effect is equal to the mention of the cause; but on the contrary (mere) ownership is established by (or referable to) divers causes, and preference cannot be given to some of the causes over the others, and therefore the cause will not be established (*e.g.*, if the witnesses merely testify to one husband having ownership of enjoyment, or *milk-i-mootaa*, then ownership of enjoyment might be the result of marriage, or might be the result of actual ownership, as of a slave; and therefore the evidence will not be acted on).

1432. (532.) A man claims marriage with a woman, who denies the marriage; the witnesses give their testimony that she is his wife, and the Kazee makes a decree in respect of the woman in his favor; then comes another man who establishes proof by witnesses of a similar fact: no attention shall be paid to the claim of the second man, because the decree of the Kazee (first made) was apparently correct (according to the evidence of the man who came first, whatever might be the fact in reality), and the same shall not be rendered void until his mistake shall appear with certainty: and a case of clear mistake by the Kazee is when the man coming second fixes for his marriage a time which happens to be prior to that of the first.

1433. (533.) And if two men claim to have married one and the same woman, and one of them has had intercourse with her, but she is living in the house of the other: then Sheikh Ool Imam Aboo Bakar Mahomed, son of Fuzul, says, that the owner of the house (in which the woman lives) is to be preferred.

1434. (534.) And if Zeid and Amar (both) claim marriage with a woman (and none of them has witnesses); the woman says (on being questioned by the Kazee), "I married Zeid after I had married Amar:" Aboo Yusoof, on whom be peace, says, she shall be decreed to Zeid, and the Futwa is according to this view: then Aboo Yusoof, on whom be peace, (resiling from this view) says, if the Kazee then questions her (after the claim has been made as aforesaid), saying, "Who is thy husband?" and the woman says, "I married Zeid after I had married Amar," the Kazee shall decree her in favor of Amar (that is, the second view of Aboo Yusoof was different from the first, in the same case, there being no real alteration in the case, by the second statement of the case by Aboo Yusoof). And Aboo Yusoof

says, "I regard the latter view as preferable (*Moostuhsun*) in a case where the decree is made on what is stated as the case, and the same view holds good in a case of sale (that is, where two persons claim to have purchased the same property, and the vendor says he sold to one, and then to the other, in this case the first purchaser shall have the property)."

1435. (535.) And in the same way, if a man says in regard to two sisters, Fatima and Khoodyja, "I married Fatima after Khoodyja:" Aboo Yusoof, on whom be peace, says, the Kazee shall decree the marriage with Fatima (that is to say, the man will be understood to say that although he married Khoodyja first, he married Fatima after the marriage with Khoodyja had come to an end; but if the husband means to say that both are still in his marriage, but Khoodyja's marriage was earlier; then the Kazee shall separate him from Fatima).

1436. (536.) And if a woman says, "I married this man yesterday," she then says, "I married this other man (pointing to a different man) a year ago:" the woman shall belong to the man whose marriage she admitted as having taken place "yesterday:" (because it shall not be presumed that she meant that she married both the men).

1437. (537.) And if witnesses give evidence that a woman admitted to them (all) her marriage with both the claimants, but the woman denies having made the admission: then Aboo Yusoof, on whom be peace, says, "I will ask the witnesses in favor of which husband the admission was first made, and I will decree her in favor of that husband" (there being no other circumstance to indicate whose marriage was earlier).

1438. (538.) And if the woman says, "I married both of them,—this one (I married) yesterday, and this one (I married) a year ago:" the woman shall belong to the man of "yesterday;" (because the woman must be taken to mean that the first marriage had come to an end; but if it appears that both marriages were subsisting, then the second shall be avoided).

1439. (539.) And if both of two men, after the death of a woman, establish (*byyuna*) proof by witnesses, as regards marriage with her, then a decree shall be made in favour of both of them (that is, when there is nothing to shew whose marriage was prior, and when there is nothing by which preference could be given to the *byyuna* of either of the parties; for if it could be proved whose marriage was prior, then the prior marriage shall be valid and the other void), for the inheritance of (only) a single

husband, because after death, the effect of marriage is inheritance, and inheritance admits of being shared in by more than one individual (contrary to the case where the spouses are alive, when the effect of marriage is the lawfulness of enjoyment, which does not admit of plurality of persons).

1440. (540.) And if one of two claimants is dead (both having claimed marriage with the same woman), and the woman then makes an admission that the marriage with the deceased was first contracted, the confirmation by her is valid (and she shall be held to be the wife of the first husband, unless separation from him could be proved).

1441. (541.) A man makes a claim against a woman that she is his wife, and establishes proof by witnesses in support of his claim, and the woman claims that she is the wife of this other man, who denies the woman's claim, and she establishes proof by witnesses in support of her claim: then Mahomed, on whom be peace, says, that the proof by witnesses adduced by the husband claimant, shall be accepted; because when the witnesses give evidence against her regarding the marriage, they also (practically) give evidence against her regarding an admission by her that she was his wife (because in marriage, the woman has also to say, "I have accepted," and this amounts to an admission), and her admission against herself is more reliable than the proof by witnesses adduced by her. Do you not see that when a man (Zeid) establishes proof by witnesses against another (Amar) that the former purchased from the latter this piece of cloth belonging to the latter (but that the latter did not, in spite of the sale, surrender the cloth, and still retains it), and the latter, the person Amar, who has the piece of cloth in his hands, establishes proof by witnesses against a different man (Bukur) to whom, he says, he sold the cloth, and who (Bukur) denies having made the purchase: in this case, the proof by witnesses adduced by the claimant (who first claimed to have purchased the cloth) shall be preferred against the person in possession of the cloth, and the reason is what I have mentioned before (*viz.*, when evidence is adduced of purchase, the same evidence proves admission of the vendor).

But if the woman, whilst establishing proof by witnesses against the other man, to the effect that she is the wife of the other man, goes on to say, "the other man (also) has already (once) claimed me," then the proof by witnesses to be accepted shall be that adduced by the woman. And this case is like that of a woman against whom two men establish proof by wit-

nesses regarding marriage with her, without fixing a date; then whichever of the two shall be confirmed by the woman, shall be her husband.

1442. (542.) A woman says to a man, "I am thy wife," and the man says, in answer, "thou art divorced:" this will amount to an admission (by the man) of the marriage, and the woman shall become divorced. And if a woman says to a man, "I am thy wife," and the man says, "Thou art not my wife, and thou art divorced:" this shall not amount to an admission (by the man regarding the marriage), according to Aboo Haneefa, on whom be peace (that is, the meaning of the husband's expression is, you are not my wife, but on the other hand, you must be the divorced wife of somebody else).

1443. (543.) A woman says to a man, "I have given myself to thee in marriage," the man says, "Then thou art divorced:" the divorce shall be effective (because the word "then" implies, "I accept the marriage, but I divorce you;" because "then" is used to denote a subsequent event); but if he says, "Thou art divorced" (without using the "then"), the divorce shall not take effect, and the statement of the man shall not amount to an admission of marriage (because here the word of *eejab*, or proposal for marriage, is used, and in paragraph 542 the word "wife" is used, and that relates to a state after the marriage has been contracted: therefore the husband, in paragraph 542, accepted the position of a husband, and in his case he gives divorce after a mere proposal, but before the marriage is contracted).

1444. (544.) And if a man makes a claim of marriage against a woman, and also establishes proof by witnesses, and the woman's sister establishes proof by witnesses that she (herself, and not the defendant) is the claimant's wife, having been given in marriage to him by her father: then the proof by witnesses to be accepted shall be that adduced by the husband, whether the woman confirms him or falsifies him (a *byyuna* is brought to establish a claim, and the husband here brings a claim, to establish which he can bring a *byyuna*; the wife's sister by making a claim seeks to establish affirmatively her claim, and also negatively, that defendant's claim should not be made out: the husband's *byyuna* being in support of a negative is preferable).

1445. (545.) And if a man makes a claim of marriage against a woman, and establishes *byyuna* or proof by witnesses, and the woman establishes proof by witnesses that her sister is the wife of the plaintiff, and the man who is the plaintiff denies this, and says, "she (the sister of the de-

fendant) is not my wife:" the Kazee shall decree the marriage with the woman who is present and shall hold that she (and not her sister) is the plaintiff's wife, and shall not decree marriage with the absentee, according to the view of Aboo Haneefa, on whom be peace (because, according to him, the Kazee has no authority to make any decree against an absent party, and, therefore, the *byyuna* against that party shall be discarded, and, therefore, also, there shall be a decree on the plaintiff's *byyuna*). And so also if the woman, who is present, establishes proof by witnesses that the plaintiff admitted marriage with the absentee.

And Aboo Yusoof and Mahomed, on whom be peace, say (in both the above cases) that the Kazee shall suspend his judgment and shall not decree marriage with the woman who is present; and if afterwards the absentee appears and establishes proof by witnesses in support of what her sister had claimed, the Kazee shall decree the marriage with her (the absentee, who has now entered appearance) if she (the sister who now appears) establishes (separate and independent) proof by witnesses, and shall not decree marriage with her on the same proof by witnesses, which had been established by the woman who has been present (all through): and the Kazee shall also effect a separation between the husband and the woman who has all along been present. And if the woman who was absent appears and denies the marriage, the Kazee shall decree the marriage with the woman who was all along present.

And if the man admits having married the woman who is absent (the case being that the man who claimed the defendant as his wife, establishes *byyuna* of marriage, and the defendant says that her sister was married to the plaintiff; then, if the man, who is the plaintiff, admits having married the defendant's sister), then the Kazee shall ask him, "was there between you and the absentee a separation;" and if he answers, "No," then the Kazee shall declare the marriage with the woman present as void; but if he says, "I divorced the absentee, who also informed me that her *Iddut* had expired;" and the woman who is present falsifies him in his allegation of having divorced the absentee, then the Kazee shall decree the marriage with the woman who is present. And if the absent woman afterwards appears and supports the man in the matter of (his) marriage (with her), but falsifies him in the matter of divorce, then the divorce shall be caused from the time the husband admitted having divorced her.

(*Note.*—An admission of divorce causes a divorce even if there was none before; but a denial of marriage does not cause a divorce. See paragraph 529.

In the present case, the sister shall be considered to have been divorced at the time of the admission, and the defendant's marriage shall not be held valid; and if she is *Mud-khool-biha*, that is, if the husband has had intercourse with her, then she is bound to observe the *Iddut*, and the Kazee shall effect a separation; and if she is *Ghyr mud-khool-biha*, then there is no *Iddut*, but still she must be separated. See paragraph 547).

1446. (546.) And if a man makes a claim of marriage against a woman, and establishes proof by witnesses, and the woman claims that the man married her mother or daughter: then this case and the case (see paragraphs 544 and 545) in which the woman claimed marriage for her sister, are the same, according to Aboo Haneefa, on whom be peace. And if the woman who is present (before the Kazee) establishes proof by witnesses that he married her mother, *and* had intercourse with her (the mother), *or* that he kissed her or touched her with desire (*Shuhwut*), or looked at her private person with desire, then the Kazee shall cause separation between the woman who is present and between the plantiff (because there is no conflict between the two *byyunas* here; the proof adduced by the plantiff establishes that the woman is his wife, and the proof adduced by the woman establishes unlawfulness, by establishing marriage, &c., with the mother); but he shall make no decree regarding the marriage with the woman who is absent.

1447. (547). A man marries a woman and then admits "that so and so was her husband who had divorced her, and that the *Iddut* had expired (before he married her), and that after that he married her;" the woman says that the so and so is still her husband (that is to say, makes a claim against an absent person): the woman's word shall not be accepted, and no separation shall be caused between her and her husband. And if the absent man then appears and denies having divorced the woman, the Kazee shall decree the woman to the man (*i.e.*, the new comer), and separation shall be effected between her and her second husband (*i.e.*, the one mentioned first); and if the first husband (the new comer) admits the marriage and divorce, and the expiry of the *Iddut*, as the second husband had said, but the woman falsifies him (the first husband) in regard to divorce; then divorce will be caused upon her from the first husband from the time the first husband made admission regarding the divorce (in the presence of the Kazee, as aforesaid) and *Iddut* shall be obligatory on her from that time, and separation shall be caused between her and the second husband (because he married her whilst she was somebody else's

wife). But if the woman confirms the first husband (the plaintiff) in everything that he said (including his allegation of divorce), then the woman shall belong to the second husband (the plaintiff).

And if the husband (who first came to the Kazee) says, the woman had a husband before me but he had divorced her, and the *Iddut* had expired, and after that he married her, and the woman says that that husband had not divorced her; then the word to be accepted is that of the husband, and the woman's word shall not be accepted; and then if a man appears and makes a claim that he is the very husband in reference to whom the second husband (the plaintiff) had made the admission, and the woman confirms him in this matter, and the second husband falsifies him: the word to be accepted is that of the second husband (not of the new comer), because he did not in this case make an admission regarding the marriage which has now come to light (that is, regarding the marriage with this particular man, the new comer). God knows best!

SECTION II.

ON EVIDENCE CONCERNING MARRIAGE.

1448. (548.) It is valid to believe in reputation (or *Shoohrut*) and hearsay (or *Tusamo*), to be able to give evidence in five things (that is, a man is a competent witness in five things, even if his source of knowledge is reputation or hearsay, in which he believes) four of those things are well-known: *viz.*, parentage (or descent, *i.e.*, *Nusab*), marriage, and death, and the fact of a person being a Kazee: and the fifth is mentioned by Khussaf, on whom be peace, and that is sexual intercourse by the husband.

1449. (549.) And Sheik-ool Imam Shums-ool Ayma, of Sarukhs, says, that testimony regarding the fact of *Wakf* is allowable (or valid) from reputation and hearsay: but the same is not valid in regard to the conditions of a *Wakf*.

1450. (550.) And in the same way as testimony in regard to marriage is valid from hearsay, so it is also valid in regard to (the amount of) dower from reputation and hearsay.

1451. (551.) And Hakim-ool Shuheed, on whom be peace, says, in his work called the Moontuka, that the testimony (of a witness who deposes from reputation and hearsay) is of two kinds: one is called *Oorfy*, or common testimony, and that is where a man hears from a tribe (or *Kowm*

that is, a large number of people), so that it is impossible to suppose that they all should agree upon a falsehood; and the other class is called legal (*Shuryee*), and that is, where two men of probity (*Adil*), or one (such) man and two (such) women testify before the man in words denoting that they (expressly) give evidence, without being called upon (by that man) to give evidence, (those men, or the man and the two women saying, "I bear witness that Zeid married Hinda"), and it strikes his mind that the fact is as is stated; and according to Aboo Haneefa, on whom be peace, it is not sufficient (in respect of any of the five things abovementioned) that one man should so testify (before the man who is to give evidence).

1452. (552). But according to Aboo Yusoof, on whom be peace, if one man of probity should testify before another to the fact of death (and not in regard to the other five things mentioned in paragraph 548), and say, "I saw his death," then it shall be lawful to that other to give testimony (before the Kazee) regarding the death (but according to Aboo Haneefa, this is not sufficient even in the case of death, as it is not sufficient in regard to the other four things).

But the correct doctrine is that death stands on the same footing as marriage and the rest (as held by Aboo Haneefa), so that one man's testimony is not sufficient in that matter (to enable the man before whom the testimony is given to be a witness before the Kazee).

1453. (553). And if a man sees a man and a woman living in one house, and dealing affectionately with each other freely, in the manner in which spouses deal with each other, it shall be lawful to him to give evidence that they are married.

1454. (554). And if a man comes from some place to another man, and relates his parentage to him, and lives with him for a long time, then the other shall not be competent to give evidence regarding his parentage until be meets with two men of probity of that place who know him, and who testify before him to the parentage of that man.

1455. (555.) And when a man becomes a witness to a fact from reputation and hearsay, and then gives evidence before the Kazee, keeping his source of knowledge ambiguous (saying,—"A married B"; or "I know that A married B") his evidence shall be valid; but if he gives details and says, "I give evidence of marriage or parentage because I heard of the same from a tribe (*Kowm*), as to whom it is impossible to suppose that they have agreed upon a falsehood," then his testimony shall not be received; just as if a man sees a house, or anything else in the hands (or possession) of a man,

who deals with the same as owners deal (with their property), and it strikes his mind that the same is his property, it is lawful to him to give evidence (before the Kazee) that the same is his property; but if he gives evidence (before the Kazee) and gives details, saying, "I give evidence that the thing belongs to him, because I saw it in his hands, and he has dealt with it as owners deal (with their property)," his evidence shall not be accepted.

This is the way the rule has been stated by Shums-ool Aima, of Hulwan (or *Hulwai*, sweetmeat seller), on whom be peace, and he has made no difference between (the question of) death, or any question other than that of death: and according to some traditions, the evidence of the man will be accepted in regard to the fact of death, although the witness in describing the source of his knowledge gives details (and says he heard from others).

1456. (556.) And if a man hears the fact of marriage, or death, or parentage, and it strikes his mind that this fact is true, and then before him two men of probity testify to the contrary to what has struck his mind as a fact at first, it is not competent to him to give evidence (before the Kazee) of the fact as it struck his mind at first, unless he believes in the falsehood of those two men. But if *one* man of probity testifies to him to the contrary of what struck his mind at first, it is competent to him to give evidence of the fact as it occurred to his mind at first, unless it occurs to his mind that this solitary man is truthful in what he testifies to.

1457. (557.) And if a man saw the marriage of a woman, or the sale of a female slave, or a wilful murder, or the admission of a man against himself regarding property (*mal*), and then two men of probity testify to him (who saw all this), that so and so (whose marriage was witnessed by him) divorced his wife thrice in their presence, or that the purchaser of the female slave (whose purchase he saw) set her free, or that the seller of the female slave had made an admission (to them before the sale) that he had set her free before the sale, or that one and the same woman had suckled the husband and the wife (whose marriage he had seen) during their infancy, when they were each less than two years of age; then the woman denies the marriage, or the female slave denies the ownership of the purchaser: then it is not competent to the person who saw all that, as stated above, to give evidence of the marriage of the woman, or of the sale of the female slave, because if two witnesses testify in the presence of a woman that her husband has divorced her thrice, and testify in the presence of a female slave that her master has set her free, it is not valid for the woman

or the female slave to allow the husband or the master to have intercourse with her: so also it is not lawful for two witnesses (including the man who saw as aforesaid) to give evidence (before the Kazee) of the marriage and sale.

And if one man of probity testifies to a witness (*i. e.*, makes a statement to the witness) who saw the marriage and the sale of the female slave (respectively), that the husband divorced his wife three times, and that the master set the female slave free: it is not lawful for the witness (who saw, as aforesaid) to avoid giving evidence of the sale and marriage (before the Kazee).

CHAPTER V.

ON THE IMPOTENT.

1458. (558.) The marriage of the impotent is valid; and if the woman knows, at the time of the marriage, that the husband is impotent, and not competent to have intercourse with women, she shall not be entitled to have recourse to law (for separation), in the same way as the purchaser, who knew of a defect at the time of the sale (has no right to return the property purchased, on account of the defect).

But if she did not know (of the impotency) at the time of the marriage, but comes to know of it after the marriage, she shall be entitled to have recourse to law (for separation), and she shall not forfeit her right by not having had recourse to law (for such a purpose), although the delay might be for a long period, until she consents to give up her right.

1459. (559.) And so also if a man is competent to have intercourse with other women and with female slaves, but is not competent to have intercourse with his wife, she shall be entitled to have recourse to law.

1460. (560.) And if the wife litigates with the husband before the Kazee, then the Kazee shall question the husband (whether he has had intercourse successfully); and if he says, "I have had intercourse with her in this marriage," and the woman denies the allegation; then, if the woman is a *Syeeba* (a woman who has had intercourse), the word to be accepted shall be that of the husband; and if she says, "I am a virgin (*bakira*—

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one who has had no intercourse)," then the Kazee shall have her inspected by women—and for this purpose, inspection by one woman is sufficient, and that by two is precautionary—and if they say she is a *Syeeba*, then the word to be accepted is that of the husband; but if they say she is a virgin, then the word to be accepted is that of the woman, as regards her allegation that the husband has had no intercourse with her; but if some of the women give evidence of virginity and others of her being a *Syeeba*, the Kazee shall have the woman inspected by other women; and if it is proved that the man had no intercourse with her, the Kazee shall give him time for one year, whether the man asks for time or not, and the Kazee shall call witnesses to the fact of his having granted time, and shall record the date on which he granted time.

And so also, if the husband admits that he could not have intercourse with her, the Kazee shall grant him a year's time.

1461. (561.) And the learned lawyers have discussed (the question) whether the year's time granted (as aforesaid) is to be the solar or the lunar year. Sheikh-ool Imam, known as Khahir Zada, on whom be peace, says, that Mahomed, on whom be peace, does not say anything regarding this (distinction) in his book.

And Ibn-i-Samata has mentioned a tradition from Mahomed, on whom be peace, in his works, called the Nuwadir (as contradistinguished from his other works, called Zahir-i-Ruwayet), that the Kazee shall grant time for one solar year, to be calculated by days—and this is the view taken by Sheikh-ool Imam Shumsh-ool Ayma Surukhsy, and by Natify, on whom be peace,—in the hope (that is, the solar year is granted in preference to the lunar year, in the hope) that (medical) treatment might be successful (or do the man good) in those days which constitute the difference between a solar and a lunar year: and this rule regarding the granting of time is not applicable except as regards (*i.e.*, cannot be exercised except by) the Kazee of a town or city (and not applicable to a minor Kazee, that is to say, only the Kazee of the town is authorized to grant time, and not a minor Kazee).

Thus, if the woman (herself, without going to the Kazee) grants time to the husband, or somebody other than the Kazee grants time (*e.g.*, her guardian), this grant of time goes for nothing (as affecting the rule authorising the Kazee to grant time).

1462. (562.) And the month of *Ramazan*, and the period of menstruation shall be counted (in calculating the year) against the husband

(that is, the month of *Ramazan* and the period of impurity shall be included in the year).

1463. (563.) And if one of the two parties (the husband and the wife), shall suffer from severe illness, so that there is no power or capacity for sexual intercourse: then, from Aboo Yusoof, on whom be peace, there are two traditions (in the matter, whether the period of such sickness is to be counted in the year or not): according to one tradition the period of illness (whatever it is), even if it is less than a year by one day, shall be counted against the husband (that is to say, if the illness lasts for one full year, then the year shall not be counted, but if it lasts for less than a year, then it shall be counted): and according to another tradition, if such period extends to more than half a month, then the period of sickness shall not be counted against the husband, and he shall have a similar period (of more than half a month) by way of exchange, and if the period of illness is different from this (that is, if it is half a month or less) then the same shall be counted. And, according to Mahomed, on whom be peace, if the period of illness is a month or more than a month, then that period shall not be counted in the year, and a similar period over and above the year will be allowed; but if the period of illness is less than a month, then it shall be reckoned in the year, and no grace or extension shall be allowed for the period over and above the year. (But see Futawai Alumgiree, Vol. I, p. 708, where it is stated that, according to the view of Mahomed, whatever be the period of illness, the same shall not be counted in the year).

1464. (564.) And if the woman runs away from her husband, then the period during which she has been away shall not be counted against the husband; and if the husband has been absent (even) on a pilgrimage, or an *Oomra*, the time shall be counted against him; and if the husband has been imprisoned so that the woman does not come to the husband, then the time of imprisonment shall not be counted against the husband, and so also if the woman imprisons him (through the Kazee) on account of her dower, and she does not come to him (the time shall not run against him); but if she comes to him in the jail (in both cases of imprisonment), where there is a place in which retirement and sexual intercourse is possible, then the time of imprisonment shall run against him.

And so also if the woman has been imprisoned on account of somebody's rights, and it is possible for the husband to approach her and to retire with her, and spend the night with her, the time shall be counted against him; but if not, then not.

1465. (565.) And if the woman has made *Ihram*, for pilgrimage of the *Furz*, or obligatory character (and not of the *Nufil*, or *Moostabub* character) then the time shall not count against the husband until the woman gets over the pilgrimage (that is, if at the time the matter is before the Kazee, the woman is observing the *Ihram*, then the Kazee, in fixing the period, shall allow a deduction). And (also) if the woman observes the *Ihram* after the Kazee has fixed the period, then the time shall not be counted against the husband, who shall get a similar period by way of exchange.

1466. (566.) And if the husband (who is impotent) observes *Zihar* (which is a form of divorce) as regards her (and the matter of his impotency is then brought before the Kazee), and if the husband is able to set free a slave (which is a mode of making *Kuffara*, or expiating, in order to get out of this form of divorce), then the Kazee shall grant him a year's time (for the same purpose for which time is granted in all the cases mentioned above) ; but if he is not able to set a slave free (to get rid of his divorce), then the Kazee shall grant him two months' time for the purpose of (the *Kuffara*, or expiation, and) getting out of the divorce (by repentance, and observation of two months' fast), and then he shall grant the (usual) period (of one year).

But if a man observes *Zihar* after the Kazee has granted time, then no regard shall be had to the same, and the said period (of two months) shall (also) be counted against him.

1467. (567.) And when the period of one year has expired, and the Kazee dies or is dismissed before the woman has been vested with authority, (that is, before the final decree declaring she has authority to have her marriage annulled has been given) and somebody else is appointed (in his place), and the woman then submits the matter to the second Kazee, and she establishes proof by witnesses (*byyuna*) that such and such a Kazee had granted her husband time for one year in her matter, and that the year had expired, the second (*i.e.*, the present holder of the office of the) Kazee, shall make the first order the basis of his decree (without granting a fresh period of one year and without proceeding afresh ; but, on the other hand, he shall take up the case from the point where his predecessor left it, and will complete the case).

1468. (568.) And if the year from the time the period was granted expires, and the woman does not (again) have recourse to law for a time

(that is, she does not, for a time, take further steps to complete the case), her right shall not be forfeited, although she might have consented to share the husband's bed during the extra period which elapsed over the year.

1469. (569.) Then (the year fixed by the Kazee having expired) if the woman takes proceedings before the Kazee (she alleging that the husband could not approach her), then if she is a *Syeeba* (one who has had intercourse with a man) the word to be accepted shall be that of the husband (on his oath); but if the husband admits that he could not have intercourse with her, or if the woman says, "I am a virgin (or a *Bakira*, *i.e.*, one who has not had intercourse with man)"—and in this (latter) case, women shall be made to examine her, and if (after examining her, they say she is a virgin—then the Kazee shall give her option (to remain with the husband or get separated from him); and if she elects to remain with her husband, or if she rises from the meeting before exercising her election (thus shewing that she does not wish for a decree for separation), or if (she does nothing at all, so that) the Kazee's minions make her get up (to remove her), or if the Kazee gets up from the meeting (having closed his court) then her right (to get a decree for separation) is rendered void (because she ought to have instantaneously exercised her election by saying she is desirous of getting separated), similar to the option of a woman who has the election (*e.g.*, where the husband says, "If you wish a divorce, you are divorced," then she must exercise her will at once).

And if she elects to get separated in the meeting (that is, in the same meeting), the Kazee shall order the husband to separate the woman (and shall ask him to say, "I have separated her or divorced her"); and separation does not take place by the woman electing separation (until the husband or the Kazee pronounces separation); then, if the husband refuses to separate the woman, the Kazee shall say, "I have separated you two" (and then one irreversible divorce shall be caused), and the (whole of the) dower shall be obligatory on the husband, and *Iddut* shall be obligatory on her (in the event of separation, whether the words proceed from the husband or the Kazee: and the whole of the dower shall become due instead of half of it, because the husband says he has had intercourse, and because *Khilwut Saheeh* was found).

And if the husband asks the Kazee for a further period of a year, the Kazee shall not accede to his request; and if the woman grants the husband a further period of a year, she is entitled (afterwards) to revoke the further extension of time.

1470. (570.) And in the same way as impotent men are granted a year's time, eunuchs shall also be granted a year's time, and so also the old man (*sheikh-i-kubeer*) although he (the sheikh) might say he has no hope of being (ever) able to have sexual intercourse with the woman.

1471. (571.) And in the case of a boy, who is fourteen years of age, who is unable to have intercourse with his wife, and who has another wife with whom he has sexual intercourse, or who has sexual intercourse with a female slave, the wife shall have the right to have recourse to law, and he shall be granted a year's time.

1472. (572.) And so also a hermaphrodite, if he makes water through the organ through which men make water, shall be granted a year's time: (here man's signs preponderate: but if the hermaphrodite is so that woman's signs preponderate, and he makes water through the organ through which women urinate, in that case, the marriage itself is not valid, because the marriage amounts to a marriage of a woman with a woman).

1473. (573.) And if the woman finds her husband sick, having no power to have intercourse with her, the man shall not be granted time, until he recovers, although the disease might last a long time.

1474. (574.) And when an idiot (*Matooh*) has been given in marriage by his guardian to a woman, and the idiot has no intercourse with her, the Kazee shall give him time for a year in the presence of his opponent (or *Khusum*, *i.e.*, the wife.)

1475. (575.) And the grant of time to the impotent cannot be but by the Kazee of the town or city: therefore, the granting of time by the wife, or by other than the wife, is of no avail. (See paragraph 561.)

1476. (576.) A man marries a woman but cannot succeed in having intercourse with her, and the Kazee (consequently) separates the two after the expiry of the time granted, and the man then marries her again (which he can well do, because the separation by the Kazee amounts to one divorce), the woman shall have no option left to her (to ask for a separation, because she knowingly married an impotent man).

1477. (577.) And if a man marries a woman, and is successful in having intercourse with her, and after this becomes incapacitated from having carnal intercourse with her, and becomes impotent, she shall not be entitled to have recourse to law (because one intercourse in the course of the marriage is sufficient).

1478. (578.) And if a man marries a woman, and is successful in having intercourse with her, and then separation is effected between them (such as that caused by one divorce, or the like) and the (same) man then again marries her, and then becomes incapacitated from having intercourse with her, she shall be entitled to have recourse to law (because the first marriage was successful, and she had, therefore, no reason to think that the second marriage would not be similarly successful), and the husband shall have time granted to him in the same way as time is granted to the impotent.

1479. (579.) And if a man marries a woman and does not succeed in having intercourse with her, and the Kazee, therefore, separates the parties by reason of the husband's impotency, and the same man then marries another woman, who knows how he fared with the first woman: then traditions in this matter have differed; and the most correct doctrine is, that the second woman shall be entitled to have recourse to law, because a man is sometimes powerless with reference to one woman and not with reference to another.

1480. (580.) And if a woman finds her husband with his male organ cut off, the Kazee shall give her present option (whether to live with him or get separated from him), and shall not grant the husband time, because the organ when cut off cannot grow again, and the granting of time would therefore be useless; and if the husband should have retired with her, then the woman shall be entitled to the whole of the dower, according to Aboo Haneefa, on whom be peace, and she shall be obliged to observe *Iddut* when the husband separates from her; but if the separation takes place before retirement, she shall be entitled to half the dower, and shall not be obliged to observe *Iddut*. And if the Kazee separates them after retirement, and then (*i.e.*, after separation) the woman gives birth to a child (even) at two years (from the date of the separation), the descent (or *nusub*) shall be established as from the husband, but the separation effected by the Kazee shall not be void.

But in the case of the impotent, when the Kazee separates the parties, but the husband had claimed (before the separation, in the course of the proceedings) to have succeeded in having intercourse with her, and the woman gives birth to a child within two years (from the date of separation), the descent (or *nusub*) shall be established, and the separation effected by the Kazee shall become void. And so also, if after separation two witnesses give evidence that the woman admitted (to them) before separation that

the husband had succeeded in having intercourse with her, then the separation effected by the Kazee shall become void; but if, after separation, the woman admits that the husband had succeeded (before separation) in having intercourse with her, the woman shall not be relied upon for the purpose of rendering void the separation which had been effected by the Kazee.

1481. (581.) And if the woman finds her husband with his male organ cut off, but she is also (*Rutka*, or) one having no place for penetration, she shall have no option (to have separation effected).

1482. (582.) And if the woman finds her husband with his male organ cut off, but goes on living with him for a long time, and he shares his bed with her, she shall (still) have her right of option.

1483. (583.) And if the woman says her husband is one with his male organ cut off, but the husband denies this charge; then, if his real condition is capable of being found out by touch, without (being obliged to have recourse to) seeing, he shall be touched with cloth intervening, without his private parts being exposed; but if the real condition is not capable of being known except by sight, then the Kazee shall direct a trustworthy man in order that he might examine his private parts, and he shall then inform the Kazee of his real condition, because in a case of necessity seeing the private parts (of a man) is allowable.

1484. (584.) A man marries a woman, and is capable in regard to a part different from the front natural passage (*e.g.*, such as, between the thighs, &c., sodomy being included—Futawai Alumgiree, Vol. I, p. 709—) so that the man emits and the woman also emits; but he is not capable of having intercourse with her in the front natural passage (wherever else he could do so); and the woman lives with him in this way for a long time, she being either a virgin or a *Syeeba*; the woman then takes proceedings against him before the Kazee: the Kazee shall grant him one year's time, and act in accordance with what we have already said.

1485. (585.) If the husband of a female slave (whether he is himself a slave or a freeman) is one whose male organ has been cut off, or who is impotent: then the option shall be with the master (and not with the wife) in this matter (that is, in regard to obtaining separation), according to Aboo Haneefa and Zoofur, on whom be peace; and if the master consents (to the woman remaining with her husband as he is), the female slave shall have no right; but if he does not consent (but on the other hand, desires separation), then the right to have recourse to law shall be with the master, as in the

case of (*Azl*) emission outside (by the husband of the female slave; that is, if the master gives his female slave in marriage, then the husband cannot make *Azl* outside, because the progeny are the property of the master). And Aboo Yusoof, on whom be peace, says, that the right of option to have recourse to law (to have separation effected between a female slave and her husband) is with the female slave, and not with the master, as he (Aboo Yusoof), has laid down in the matter of (*Azl* or) emission outside (Aboo Yusoof having been of opinion that if the husband of the female slave emits outside, the right to object is in her and not in her master, although he also holds that the progeny shall belong to the master, in accordance with the mother's status): and there is a difference as regards the view Mahomed, on whom be peace, entertained in this matter: some have said that he agreed with Aboo Yusoof in this matter, as he agreed with Aboo Yusoof in the matter of (*Azl* or) emission outside; whilst others have said that he (Mahomed) agreed with Aboo Haneefa, in this matter (although he differed from him in the matter of *Azl*, and agreed with Aboo Yusoof in that matter).

1486. (586.) And when the Kazee shall have effected separation on account of the husband being one whose male organ has been cut off, or on account of his impotency, then this separation shall amount to one irreversible divorce.

CHAPTER VI.

ON THE RIGHT OF ELECTION IN REGARD TO MARRIAGE.

1487. (587.) Elections are of various kinds: one kind of election is such that it is applicable to all transactions, and that is, the right of election (or option) to permit (or validate) the contract of a *Fuzoolee* (or volunteer; and this right is applicable to all transactions, *viz.*, to all kinds of contract entered into by the *Fuzoolee*): and according to Shafei, on whom be peace, to elect or to ratify (a contract entered into by a *Fuzoolee*) is impossible, because, according to him, the contract entered into by the *Fuzoolee* (or volunteer) is not dependent (but is absolutely void), and therefore, it is impossible to conceive the idea of validation (in regard to such a contract).

1483. (588.) Another kind of election is that which relates to transactions which admit of dissolution (or *Fuskh*, *i.e.*, which are capable of being dissolved and annulled, as, for instance, a sale which might be annulled, and after annulment, no right flowing from the original contract remains; just as if the contract had never taken place); and this right is therefore not found in relation to a transaction which does not admit of dissolution; as, for instance, marriage, divorce, and emancipation (which do not admit of *Fuskh*, or cancellation. *Nikah* does not admit of *Fuskh* in the sense that it is impossible in regard to it, even after it is annulled, to say that the parties are restored to the condition as if it had never taken place; because even if no other consequences are left behind, one consequence surely remains, and that is, that even if the marriage is annulled, the consequences in regard to prohibited degrees of marriage in some cases remain, so that the husband cannot marry the daughter of the wife who was married to him, but whose marriage has been annulled. So also in regard to divorce: when a divorce has been pronounced, the husband has no power of annulling or cancelling or recalling it: a husband has power to pronounce three divorces; when he has pronounced one divorce, he can recall that divorce in the sense that he can revoke it and resume the marriage relation; but one divorce has gone from his hands, and what is left with him is the power to pronounce two more divorces. Accordingly the Humawee, at p. 596, says, "That marriage is *lazim* or binding, so as not to admit of the quality that the parties can be restored to their position as before marriage." *Fuskh*, or cancellation, therefore, in relation to marriage, means, that from the time of cancellation the marriage ceases to exist, not that the parties are restored to the original state as if the marriage never existed. A sale admits of cancellation in the sense that it is so annulled as to cease to exist and to be as if it never existed, *e.g.*, if a man sells a she-goat which, after the sale, gives birth to young ones: if the sale is cancelled, then, inasmuch as a sale admits of *Fuskh*, the vendor shall take back the goat with its young ones: but if a sale were not to admit of cancellation, in the sense that the parties could be restored to their former position, but were to admit of cancellation in the sense that it could be broken off as from a certain time, then the young ones would belong to the purchaser): and that right is the right of option. When a condition of option is stipulated in a marriage, then, according to us (the three Imams), the marriage is valid, but the condition is void: but according to Shafei, on whom be peace, the stipulation of a condition of option in marriage renders the marriage void.

1489. (589.) And one of those rights (*i.e.*, another kind of election) is the option of inspection (as when a person purchases a property without having seen it), and the same is not applicable to marriage, either as regards the wife or as regards the dower (when, for instance, a slave or an animal is fixed as dower).

1490. (590.) And another kind is the option (which arises out) of blemish, and that is the right to annul a contract by reason of blemish, and the same is not applicable to marriage: therefore the wife cannot be returned on account of any blemish: and Shafei, on whom be peace, says, that the husband is entitled to return the woman on account of five kinds of blemishes, *viz.*, insanity, leprosy, white leprosy (*Kuron*, or) protuberance from the private part (which prevents intercourse), and (*Rutk* or) closing of passage of penetration, and on account of these blemishes the husband is entitled to annul the marriage and return the woman; so that if he returns the woman before carnal intercourse, the whole of the dower is dropped (that is, ceases to be payable); and if after carnal intercourse (which, in the case of the last two blemishes, will amount to retirement), she shall be entitled to the proper dower, which is payable in case the marriage is dissolved.

1491. (591.) And if the wife finds her husband insane, or affected with leprosy or white leprosy, then Aboo Haneefa and Aboo Yusoof, on whom be peace, have said, she is not entitled to get separated; but Mahomed, on whom be peace, says, she is entitled to get separated.

1492. (592.) And if the wife finds some blemish in the dower, she shall not return the dower for a slight blemish, but she is entitled to return it for a more serious (*fahish*) blemish, except when the dower is (*Mukeel*, or *Mouzoon* or) such as is estimated by measure or weight, when she can return the same for a small or a great blemish.

And if she finds her husband (*Mujboob* or) one whose male organ has been cut off, or impotent, she is not entitled to annul the marriage (that is, of herself, without the intervention of the Kazee), but she shall be entitled to claim to be detained with propriety (or *Maroof*, that is, to be maintained in a befitting manner) or to be separated on account of the *Joob*, or the impotency; and for this reason (that is, the woman is not entitled of her own will to separate, but she must get separated by the Kazee) the separation which results from the condition of the male organ being cut off, or from impotency, is a divorce.

1493. (593.) The right of election which appertains to marriage are four in number: the option of a woman, who has been given the option to divorce herself; and the woman who has been vested with the option of freedom; option to annul (*Fuskh*) the marriage on account of absence of equality (or *Koofooship*); and the option of puberty.

1494. (594.) As regards the first, when a man says to his wife, "Exercise your option," or "Exercise your option upon yourself," intending thereby a divorce; and the woman says, "I have exercised the option upon myself:" then one irrevocable divorce shall be caused (or effected). And this option appertains to a woman, and is not rendered void by the silence of the woman, whether she is a virgin or a *Syeeba;* but on the other hand, it subsists until the end of the meeting, unless she rejects it, or stands up, or turns her face aside (or acts so as to imply she does not want the option); and the separation which results from this option is not dependent on the decree of the Kazee.

1495. (595.) As regards the option of freedom: the same appertains to a married woman if she is a slave or *Moodubbura,* or *Oomm-i-Wulud,* when she gets her emancipation, before carnal intercourse (with her husband) or afterwards; and then she is entitled to annul (*Fuskh*) the marriage, whether her husband is a free man or a slave, according to us (the three Imams).

And so also the *Mookatuba,* whether she is a minor or an adult, when she is given in marriage by her master, with her consent; if she earns her freedom, or if her master sets her free, then that *Mookatuba* shall be entitled to exercise her option of freedom according to us (and she shall be entitled to elect whether she shall remain the wife of that particular individual or not).

And this option is similar to the option of the *Mookhyyura,* or a woman who has the option to divorce herself, given to her by her husband, according to us, in so far as it is peculiar to women. And the happening of separation by reason of this option does not depend on the decree of the Kazee; and this option is not rendered void by silence, but the same subsists up to the end of the *Mujlis,* except when the woman renders her option void by express words pronounced by her, or by implication (*e. g.*, going to her husband, &c.)

And there is no distinction between this option (the option of freedom) and that at the disposal of a *Mookhyyura,* or a woman who has been

vested with the right of option to divorce herself by the husband, except in one single particular, and that is this, that the separation which takes place by virtue of the exercise of the option of freedom is not a divorce, whereas the separation which takes place by virtue of the exercise of the right of option (to divorce herself) by a woman in whom the option to divorce herself is given by the husband is divorce.

1496. (596.) Now as to option arising from absence of equality, or *Koofooship :* if a woman gives herself in marriage to one who is not her equal (or *Koofoo*), then it shall be the right of the guardians of the class called residuaries (*asbat,* as contradistinguished from *zawil arham*), to annul the marriage; and this separation is not perfected except by the decree of the Kazee; and before the decree of the Kazee, the marriage subsists with all the incidents (or consequences) of marriage, such as divorce, or *zihar,* or mutual inheritance. And the option of the guardian is not rendered void (or negatived) by his silence, and not by his abstaining from asserting a claim to separation, although a long time might elapse, until the woman gives birth to a child (though sexual intercourse does not take away that right): and the separation caused by the Kazee at the instance of the guardian, by virtue of the exercise of this option, shall be annulment (*Fuskh*) of the marriage, and not a divorce; so that if the separation takes place before valid retirement, the whole of the dower drops, and after such retirement, the dower shall not drop, and the husband shall be bound to pay the maintenance during the *Iddut* (if the separation takes place after retirement).

And if the guardian ratifies such a marriage, his right to have the marriage annulled shall become void: and so also (shall he forfeit his right) by accepting the dower.

And if the guardian himself marries the woman (whether a minor or not, and if she is an adult, then with her consent) to a husband who is not her equal (or *Koofoo*); and then there occurs separation between the spouses (for some other cause), and then the woman herself marries the same husband again, without the intervention of a guardian, the guardian shall be entitled to separate the spouses.

And if the guardian gives the woman in marriage to one who is not her equal (*Koofoo*), and the husband then divorces her by way of revocable divorce, and he then revokes the divorce (and takes her back), it is not competent to this guardian to separate the spouses (because the former

marriage, which was through the guardian's own instrumentality, was not put an end to by the revocable divorce); but if the husband divorced her by way of irreversible (*bain*) divorce (so that the marriage was put an end to), and the husband then marries her without the permission of her guardian, the guardian is competent to separate them, and the consent of the guardian to the first marriage is no consent (*i.e.*, the first consent will not be operative) regarding the second marriage.

And if one of several guardians gives the woman in marriage to a man who is not her equal (*Koofoo*), then that guardian, or the one who is inferior to him, shall not have any right to separate the spouses.

1497. (597.) Now, as regards the option of puberty. If a guardian other than the father or the grandfather gives a male or a female minor in marriage, then the male or female minor shall have the option (of annulling the marriage on attaining the age) of puberty.

And if a male or a female minor is given in marriage by the Kazee, then, from Aboo Haneefa, on whom the peace, in this matter, there are two traditions: Sheik-ool Iman Shums-ool Ayma, Sarukhsy, on whom be peace, says, that apparently the option does exist when the Kazee has given them in marriage.

And so also when a female minor is given in marriage by her mother, then, from Aboo Haneefa, on whom be peace, there are two traditions in regard to the option of puberty, but apparently the option of puberty is established (that is, the tradition in favor of the option is accepted).

1498. (598.) As regards a female idiot. If she has been given in marriage by her brother or her paternal uncle, and then she recovers her intellect, she shall have the option (after recovery of her intellect), just as a female minor has the option when she attains puberty; but if the female idiot has been given in marriage by her father or paternal grandfather, then she shall have no option; and if she has been given in marriage by her son, then there is no tradition in this matter from Aboo Haneefa, on whom be peace; but the learned lawyers have laid down that it is fit that she shall have no option, in the same manner as when she is given in marriage by her father; and from Mahomed, on whom be peace, it is reported that she shall have the option.

1499. (599.) And if the master or mistress gives his or her minor female slave in marriage, and she is then set free, and she afterwards attains her puberty, she shall have the option of freedom (to be exercised

after puberty); and whether she shall also have option of puberty, is a question upon which the learned lawyers have differed; but the correct doctrine is, that she shall not have the option of puberty, because the master is the owner both of her person and of what she earns, and therefore, his authority is higher than the authority, by virtue of guardianship, which the father and the grandfather have (and when, in case the father or the grandfather gives the female minor in marriage, she has no option of puberty; then in case the master does so, she shall, *à fortiori*, have no option of puberty).

1500. (600.) The option of puberty differs from the option of freedom in certain particulars: one point of difference is, that the option of freedom is established only for females, whereas the option of puberty is established for males as well as females.

Another point of difference is that, when the option of freedom comes to be established for a virgin, it is not rendered void by her silence; on the other hand, it subsists up to the end of the meeting: but the option of puberty is rendered void by the silence of the virgin (one who has not been married before, whether she has had connexion or not): and the option of puberty in the case of a female *Syeeba* (*i.e.*, a woman who has been married before, whether she has had intercourse or not), or of a boy, is not rendered void, unless it is rendered void in express words: therefore, when a boy (after attaining majority), says, "I have broken (or dissolved) the marriage," and intends by these words to give divorce, then, according to Aboo Haneefa, on whom be peace, this will (if that intention exists, and not otherwise), amount to a divorce; and if he intends by those words to give three divorces, then this shall amount to three divorces.

Another point of difference is, that the separation, in case of the exercise of the option of freedom, is established by her words, when she says, "I have separated myself;" but in the case of the option of puberty, separation is not effected until the Kazee decrees separation between the spouses; and when the Kazee decrees separation, the whole of the dower drops if the separation takes place before sexual intercourse; but if the separation takes place after sexual intercourse, the woman shall be entitled to the fixed dower: and when the option of puberty is established in favor of a *Syeeba*, then the option of puberty is not rendered void, except when it is rendered void in express words, or by giving opportunities to the husband, or by asking for her dower, or by asking for her maintenance; whereas, on

the contrary, the option of freedom, and the option of a woman to whom the husband has given authority to divorce herself (*Mookhyyura*), are rendered void by standing up at the meeting.

And another point of difference is that in the case of the option of freedom, if the woman knows of the fact of marriage, and the fact that she has got her freedom, but is not aware that she has the right or option of freedom, she shall be entitled to exercise her option when she comes to know of the option, and she shall be excused for her ignorance (because, being a slave-girl, she could have no opportunities for acquainting herself with legal doctrines) : but in the case of the option of puberty, if she knows her husband (that is, if she knows that so-and-so is her husband), and knows her dower, but does not know that she has the right to exercise the option, her ignorance will be no excuse : and the separation in consequence of the exercise of the option of puberty (by a boy, or by a *Syeeba*, or by a *Bakira*) does not amount to a divorce, just as separation in consequence of the exercise of the option of freedom, or of the option arising from the absence of equality (is not divorce). (See Fatawai Alumgiree, Vol. I., p. 404, line 7, where it is stated that separation when caused by the exercise of the right of option of puberty does not amount to a divorce; because in that separation, the cause emanates from both the man and the woman; and so also separation caused by the option of freedom is not divorce : on the other hand, the separation caused by a *Mookhyyura* woman does amount to divorce: the rule is so laid down in the Siraj-i-Wuhhaj. And the general rule is this, that when the separation takes place so that the woman partakes in the cause, and the husband is not the sole cause, there the separation is *Fuskh*, or a concellation of the marriage, as in the case of the exercise of the option of freedom and the option of puberty, where the separation is *Fuskh* : and when the separation takes place so that the man alone is the cause, such separation is divorce, as *Eela*, and *Joobb*, and impotency : so is it laid down in the Nuhur-ool Faik).

1501. (601.) And if a *Bakira* (or virgin) attains her puberty, in the middle of the night, and is not able to call witnesses (then and there, as to the fact of her having attained her puberty) then Mahomed, on whom be peace, holds, that she shall, as soon as she sees the blood, say, "I have separated myself and broken the marriage (*i.e.*, dissolved it)," and when the morning arrives, she shall call witnesses, and say, "I have *just* (at the present moment) seen the blood, and separated myself;" then Mahomed was

asked, "Is it competent for her to say so (that is, to say in the morning that she has just seen the blood, whereas she saw it at night)" Mahomed said, "Yes," because if she gives information (to the witnesses) that she saw the blood in the night, and she (then) separated herself, then her word shall not be accepted, and her option shall become void; and it is (also) reported from him (Mahomed) that if she says before witnesses, or before the Kazee, "I broke (or dissolved) my marriage, at the time I attained puberty," her word shall be accepted; but if she fixes the time, and says "I attained puberty yesterday, and separated myself," her word shall not be accepted; and if she says, "I did not know of my marriage until just now, and I now separate myself," (she having had blood before) her word shall be accepted.

And if she attains puberty and says, "All praise is to God! (*Al humdo Lillah*) I have separated myself," she shall have her right of option (that is, the delay in uttering the expression "God be praised!" shall not make her forfeit her right, provided she expresses herself instantaneously and goes on continuously).

[*Note.*—The copies of the Fatawai Kazee Khan, which I have collated, all contain the word *Syeeba*, and not *Bakira*, in reference to whom the rule is laid down in paragraph 601: but in paragraph 600, it is clearly laid down that, in regard to a *Syeeba*, her option is not avoided until she expressly gives up her right. Therefore paragraph 601 if it relates to a *Syeeba*, lays down an inconsistent rule. On referring to other authorities, it clearly appears that the rule laid down in paragraph 601 relates to a *Bakira*, and not to a *Syeeba*. I have, therefore, struck out the word *Syeeba*, and substituted the word *Bakira* instead. See Futuh-ool Kudeer, Vol. 2, pp. 53 and 54: Ruddool Moohtar, Vol. 2, p. 502, and Fatawai Alumgiree, Vol. I, p. 403. The Ruddool Moohtar says, that the option of puberty, in the case of a *Syeeba* and a boy, lasts for the whole of their life-time, unless they expressly consent to the marriage or do acts which imply a ratification of the marriage. As regards the utterance of a supposed falsehood, the Ruddool Moohtar says, the meaning of the expression, "I have seen my blood just now," or "I have reached puberty just now," means "I have blood on just now," or "I am at present an adult:" so that, if she saw the blood in the middle of the night, or if she attained her puberty at that time, then it is competent for her to say, in the morning, "I have blood on just now," or "I am at present an adult." Therefore the formula which the woman has to utter in the morning does not involve any

falsehood. And the Futuh-ool Kudeer ...ys, that to keep the right alive, ...th just a little].
it is sometimes allowable to vary the tr... ...kira wife (referred to in paragraph

1502. (602.) And if the B... house which is cut off from people (*i.e.*, 601) attains her puberty in a..., and she in consequence sends a female slave situated in an isolated place ...voked by her, then her option shall be ren- to fetch witnesses, to be ...is takes place with promptitude (that is, unless she dered void, unless t... broken the marriage" and then sends for witnesses first says, "I ... it is necessary that she should say promptly on attaining promptly): ... "I have separated myself, and broken the marriage:" and her puber... ys so, her right shall not be rendered void by delay (in waiting if she sa... nesses), unless she (before the decree of the Kazee) allows oppor- for wit... ties to the husband.

1503. (603.) And if the option of puberty and the right of pre-emption be both established in the *Bakira* wife (*i.e.*, if both should accrue to her at one and the same time), then she shall say, "I demand both rights," and shall then go into details (or explain herself), and commence her explanation of the details by saying "I have separated myself." Some have said she shall demand her right of pre-emption in a voice denoting a loud cry, and her crying in this manner (*i.e.*, demanding the right of pre-emption in a crying tone and voice) whilst giving utterance to her demand of pre-emption shall amount to a repudiation by her of the marriage, and also a demand by her of the right of pre-emption, and this will be the effect according to those who hold that crying aloud amounts to a repudiation of the marriage.

CHAPTER VII.

SECTION I.

ON FOSTERAGE OR "REZA."

1504. (604.) Fosterage in the matter of establishing unlawfulness in marriage, is tantamount to descent (or *nusub*) and *Sahreeut*: and in the same manner as unlawfulness by reason of *nusub*, in the case of mothers and daughters, extends to grandmothers (*i.e.*, mother's mother in the ascending line) and to descendants of children (*i.e.*, the *Nuwafil*, in the descending line), so also unlawfulness by fosterage extends to the ascendants of the woman who suckles, and to her descendants, and to her brothers and sisters.

1505. (605.) And unlawfulness, by reason of fosterage, in the same manner as it is established in the mother (who suckles), is established in the direction of the father (*i.e.*, the husband of the woman who suckles): and the father is the male in consequence of whose carnal intercourse with the woman the milk descends in her (that is, if a boy is suckled by a woman, then that woman who is the boy's foster mother, is unlawful and prohibited to the boy, and the mother's ascendants and descendants are also unlawful and prohibited to the boy. So also if a girl is suckled by a woman, then the woman's husband, who produced milk in the woman, is forbidden to the girl, as he is the girl's foster father; and the husband's ascendants and descendants are also forbidden to the girl).

1506. (606.) And Shafei, on whom be peace, says, unlawfulness is not established in the direction of the father (*i.e.*, if a girl sucks the milk of a woman, then the husband of the woman is not unlawful to the female: nor are his ascendants or descendants unlawful to the girl).

1507. (607.) And the learned lawyers have designated the rules relating to fosterage, as rules relating to the milk of the male (or *Fuhul*, *i.e.*, a bull). And according to us (the followers of the three Imams) the male (or the bull) is the father of the child who sucks (that is, the woman's husband who produced the milk in her), and the mother of the male (the bull) is the grandmother of the child, and his sisters are the child's pater-

nal aunts, and the children of the mal e (the bull), are the brothers sisters of the child; so that it is not la wful to such a child to marry of these: and it is not lawful to su ch a child to marry a woman with wh that male (the bull) has had ca rnal intercourse, or to marry his wife (t is, other than the woman who has suckled): and it is not lawful to male (the bull) to ma rry the woman with whom such a child might ha carnal intercourse, or the woman whom such child might marry.

1508. (608.) And if the male (the bull) has two wives, who a pregnant from him, and each of them suckles each of two infants; then t infants thus suckled shall be brothers from the same father only, and one of the two infants is a female (the other being a male), then the ma riage between them is not valid: and if both of them are females, then is not lawful that they should be joined together in marriage to one an the same man, in the same way as it is not valid that two sisters by descen (*Nusub*) should be joined together in marriage to the same man.

1509. (609.) Sucking a small quantity of milk or a large quantity of milk is equal (for the purposes of fosterage), according to us (the followers of the three Imams); but Shafei, on whom be peace, says, that fosterage is not established unless the infant has had five sucks at five different times, so that each suck should be sufficient to satisfy the infant: and those who act on the apparent meaning (Ashab-ool Zawahir) of language (as contradistinguished from those who draw deductions and inferences from reasoning) hold that it is necessary that the infant should have sucked thrice (so as to establish fosterage).

1510. (610.) And just as fosterage is obtained (*i.e.*, established and made out) by sucking from the breast, so is it obtained by making the babe swallow the milk (*Sub*), or by dropping it into the nostrils, or by dropping it into the throat; and fosterage is not obtained by dropping the milk into the ear, or into the hole in the penis, or in a sore on the belly which reaches inside, or in a sore on the head which reaches the brain; and neither, according to the Zahir-i-Ruwayet, is it obtained by injecting the milk through the anus; but it is reported from Mahomed, on whom be peace, that fosterage is obtained by injecting the milk through the anus.

1511. (611.) And the period of fosterage, according to Aboo Haneefa, on whom be peace, is measured by thirty months (that is, until the infant attains the age of two years and a half); and if an infant has sucked within this period, then the unlawfulness is established, whether he has been

weaned at the completion of two years of age or not (that is, the woman must suckle within the age of thirty months from the birth of the child, in order that fosterage might be established, whether it has been weaned by its own parents, or by another nurse, at two years of age or not); but if the infant has sucked milk after the age of two years and a half, then unlawfulness is not established, whether the infant has been weaned or not.

And Aboo Yusoof, and Mahomed and Shafei, *on whom be peace, say* that the period of fosterage is *measured by two years; and if the infant* has sucked milk within two years of age, the *unlawfulness shall be established*, whether the infant has been weaned *or not, and that, after two* years of age, unlawfulness shall not be established, whether the infant has been weaned or not.

And Zoofur, on whom be peace, says, that the time for fosterage is measured by the age of three years.

1512. (612.) And there is a concurrence of opinion (amongst the Hanifites and others) that the time of suckling (*i.e.*, nursing) for which hire can be claimed *against the* father of the *infant, is measured by two* years, (counted from the birth): so that, if the divorced wife makes a claim for hire for *suckling* (*or nursing*) *against* the father *in respect* of a period after the two years, and the father refuses to pay the *hire*, he shall not be compelled to make the payment; but he shall be compelled to pay (for the nursing) in respect of the period of two years.

1513. (613.) And Hussan has reported a tradition from Aboo Haneefa, on whom be peace, that, if the infant is weaned within two years, and the infant becomes accustomed to eating ordinary food and subsists on eating only, and he is then suckled, then the unlawfulness of fosterage is not established: and according to the Zahir-i-Rawayet, when the infant is suckled within the period of suckling (that is, before the infant is 30 months old), then, under all circumstances, the unlawfulness is established (whether he has got accustomed to eating food or not).

1514. (614.) When a man sucks the breast of his wife, and imbibes her milk, his wife shall not become unlawful to him, for the reason stated by us, that there is no fosterage after (the period of) weaning (that is after he has been weaned at 30 months of age).

1515. (615.) If a virgin (one who has not been married, and has had no intercourse) who has never been given in marriage, has milk down in her breast and suckles an infant, she shall become the mother of the in-

fant, and all the rules of fosterage shall hold good as between her and th infant. So that if the virgin marries a man, and her husband divorces her be fore having carnal intercourse with her, it shall be competent to this husband to marry the infant (if a girl; because, although the girl stands to the woman in the relation of a daughter, still the rule is that the daughter of the wife becomes unlawful only when intercourse is found with the mother; but the reverse is the rule in the contrary case, *viz.*, if a man marries the daughter, then her mother becomes unlawful by the mere fact of the marriage: and in this case the milk was not produced by the husband, and the rule stated in the text is not confined to the case of a virgin who gets milk, as stated in the text, but is applicable to all like cases); but if the husband divorces the woman (the virgin in the case) after intercourse, it is not lawful to him to marry the girl (suckled by the woman), because the girl becomes a *Rubeeba* (that is, the daughter) with whose mother he had had intercourse.

1516. (616.) And fosterage is established by sucking the milk of a dead woman, whether the milk has been drawn (and kept in a vessel) before death (and taken after death), or drawn after death (and kept in a vessel, and then taken or sucked after death). And Shafei, on whom be peace, has said that fosterage is not established with milk drawn after death, in the same way as unlawfulness of *Moosahra* is not established by carnal intercourse with a dead body.

1517. (617.) And if milk descends to a man (in his breast), and he suckles a babe with the milk, the unlawfulness of fosterage is not thereby established.

1518. (618.) There is no fear (of unlawfulness) if a man marries his child's foster mother (that is, it is competent to a man to marry his *Nusuby* child's foster mother, or to marry his foster son's foster mother) and the sister of his child by fosterage (that is, it is competent to a man to marry his *Nusuby* child's foster sister; or his foster child's *Nusuby* sister, or his foster child's foster sister), because a man's marriage is valid with his (*Nusuby*) child's (*Nusuby*) sister, if she is not the child of the woman with whom he has had intercourse (*e.g.*, if the child's sister is by the same parents, then she is the man's own daughter: if the child's sister is by the same father only, and by different mothers, then also she is his own daughter: if the child's sister is by the same mother only, but by different fathers, then she, the child's sister, is the daughter of the man's *Moutooa*: in these cases the marriage of the man with his child's sister is not valid: but

it is valid in the following case). Thus, if a female slave is common to two masters, and she gives birth to a child (and it is not known which of the masters is the father of the child), and both the masters claim the child as their own (so that the Kazee will hold that the child shall belong to both masters, there being in the case stated no reason for preference) : and (then suppose) each of the two co-sharers has a daughter from a different wife, (then each of the daughters will be half-sister to that child) : it is competent to each of the two masters to marry the daughter of his co-sharer, *although she is the sister of his child by Nusub.* (*And when a man can* marry his *Nusuby* child's *Nusuby* sister, then he can also marry his foster child's *Nusuby* sister ; or his *Nusuby* child's foster sister ; or his foster child's foster sister). And the illustrations of this are various.

1519. (619.) When two children partake of the milk of one animal, then the unlawfulness of fosterage is not thereby established between them.

1520. (620.) And if the milk of a woman is mixed with food, and two children are made to partake of the food ; then if the food is cooked so that the rice is cooked with the milk of the woman (and the two children partake of the food), then unlawfulness is not established between the children according to all the (three) Imams whether the milk preponderates or the rice preponderates (and whether the children are made to eat in morsels or are made to sip or suck) ; and if the food is not cooked (on fire) with the milk, then if the rice preponderates, unlawfulness is not established, according to them (*i.e.*, all the three Imams referred to above) ; although it is said by some (*i.e.*, although some make a distinction) that this is so (*i.e.*, there is no unlawfulness) if the milk does not drop when the morsel is raised, but if it drops, then unlawfulness is established : the correct rule being that unlawfulness is not established (whether the milk drops or not) ; but if the milk preponderates (in case the food is not cooked with the milk), then, according to Aboo Haneefa, unlawfulness is not established (even then) ; but his two disciples have said that unlawfulness shall be established, as when human milk is mixed with the milk of the goat, and the human milk preponderates, then unlawfulness is established (even according to Aboo Haneefa).

And so also, when the woman soaks some bread in her milk, and the bread draws in all the milk, or when she mixes *suttoo* with her milk, then if the taste of the milk is felt (in eating the bread or the *suttoo*), the unlawfulness is established.

This difference in the rule (that is, the difference that if the milk preponderates in the case set forth above, then, according to Aboo Haneefa unlawfulness is not established, whilst, according to his two disciples unlawfulness is established) is when the food is taken in morsels (that is, when the food is thick): but if the food (not cooked) is sipped, little by little, then the unlawfulness is established, according to all (including all the three Imams. *Note.*—The food with which the milk is mixed is either cooked on the fire, or not: if it is cooked, then unlawfulness is not established, according to all, whether the milk preponderates or the rice preponderates, whether the mixture is thick or thin, and whether the child is made to take it in morsels or is made to sip it, because the mixture becomes a new substance. If the mixture is not cooked, then if the rice preponderates, and the milk is small in *quantity*, then, *according to all* the Imams, unlawfulness will not be established: and this is the correct view, although some lawyers have taken a contrary view. But if the milk preponderates, and the quantity of rice is small, then if the mixture is thick, so that the child eats it morsel by morsel, then, according to Aboo Haneefa, unlawfulness is not established, but according to his disciples it is established: but if the mixture is thin, so that the child sips it, then according to all the three Imams, unlawfulness is established. (See Rudool Moohtar, Vol. II, p. 671, where the Doorool Mookhtar says, the mixture, in no case, establishes unlawfulness; but the Rudool Moohtar points out the mistake in the case where the food is not cooked and the mixture is thin and the child sips it. Kazee Khan is in accord with the Rudool Moohtar, who is supported by the Nuhur and the Futuh-ool-Kudeer).

1521. (621.) And if the milk of a woman is mixed with water, and two children are made to drink the same; then, if the milk preponderates, the unlawfulness is established according to all the three Imams; but if the water preponderates, the unlawfulness is not established (according to all the three Imams).

And so also, if any drug (or medicine) is made up with the woman's milk, then if the drug preponderates, unlawfulness is not established, according to us (the followers of the three Imams); but if the drug is less (and the milk preponderates) then the unlawfulness is established.

Then Mahomed, on whom be peace, has explained the subject, saying, if the drug does not effect any change (or alteration, such as in color, &c.) in the milk, then the unlawfulness is established; but if the drug does effect

a change in the milk, then unlawfulness is not established. And Aboo Yusoof, on whom be peace, has said, if the drug alters the taste of the milk and (also) its color, then there shall be no fosterage; but if the drug alters the one and not the other, then there will be fosterage. And it is said by some, that Aboo Haneefa, on whom be peace, entertained the view that when the drug is made up with milk, or when the milk is mixed with water, then the unlawfulness is not established under any circumstance (whether the milk preponderates, or whether any change takes place or not).

1522. (622.) And if the milk of one woman is mixed with that of another, and a child is made to swallow the same, then Aboo Yusoof, on whom be peace, has said,—and this is his tradition from Aboo Haneefa, on whom be peace—fosterage is established with the woman whose milk was greater in proportion; but if the proportion is equal, then fosterage is established with both the women: and Mahomed, on whom be peace, says, that fosterage is established with both the women under all circumstances.

1523. (623.) A woman has milk (in her breast): her husband then divorces her (whilst she has milk from the husband): then she marries another husband, and conceives from the second husband (the milk from the first husband lasting all the while) and she suckles an infant (before delivery): Aboo Haneefa, on whom be peace, says, that fosterage (of the child suckled) shall be established with the first husband, until she gives birth by the second husband: but when she gives birth (by the second husband, and then suckles the child) the fosterage (of the child) shall be established from the second husband: and from Aboo Yusoof, on whom be peace, there are two traditions (in the case where the child is suckled before the delivery): according to one tradition, if she can distinguish that the milk has descended from the second pregnancy (*i.e.*, the pregnancy by the second husband), then the fosterage (of the child) shall be established with the second husband, and the rule of fosterage with regard to the first husband shall be cut off (that is, there shall be no fosterage with the first husband): and according to the other tradition, if she becomes pregnant by the second husband, then the fosterage with the first husband shall not be established. And Mahomed, on whom be peace, says, (that in the case under consideration, when the woman has suckled before delivery) fosterage shall be established with both the husbands, until she is delivered of her pregnancy by the second husband (and if she suckles after delivery, then fosterage with the second husband alone shall be established).

1524. (624.) And when a woman gives birth to a child from her husband, and the husband then divorces her, and the woman marries another husband, and suckles a child with the milk from her first husband, whilst she is with her second husband, the fosterage is established with her first husband; because the descent of milk was from the first husband.

1525. (625.) A man marries a woman who never gives birth to a child from him at all, (and never even has an abortion), but milk descends to her, and she suckles a child: fosterage shall be established with the woman and not with her husband; so that the children of the man from a different woman shall not be unlawful to the infant.

1526. (626.) A man commits *Zina* with a woman, who gives birth to a child by him, and she with this milk suckles a female infant: it is not valid to this man, or to his fathers (including grandfather) or to his children (including children's children, and so forth) to marry this female infant.

1527. (627.) And it is mentioned in the Book on Claims that if a man says, as regards a male slave, "This is my son by *Zina*," and the man then purchases the male slave with his mother: the male slave shall become free, (because the man has purchased his son), but the female slave shall not be the man's *Oomm-i-Wulud*.

1528. (628.) A man marries a woman, who then gives birth to a child by him, and she suckles the child, and then her milk dries up; and her milk again appears after it had been dried up; and she then suckles another infant: it shall be lawful to this other infant to marry the children of this man by a woman other than the woman who suckled that infant (the milk having dried up, and a fresh current of milk having appeared, this fresh milk was not from the husband).

1529. (629.) Fosterage which is superinduced (or is brought about, or *taree*) after marriage, has the same effect as fosterage before marriage, (*e.g.*, as a foster sister is unlawful; so if a man marries an infant, who is then suckled by the husband's mother, the wife shall become unlawful to the husband). The explanation of this rule is this; if a man marries an infant girl (of less than two and a half years of age) and then divorces her, and he then marries a woman who has milk (from another husband), and this woman suckles the infant (who had been divorced): the adult woman (*i.e.*, the new wife) shall become unlawful to her husband; because she becomes the mother of his (former) wife, (in the same way as if a man marries the daughter, whom he divorces, he cannot afterwards marry the mother,

because by mere marriage with the daughter, the mother becomes unlawful).

And, similarly, if a man marries a female infant (less than two and a half years of age); then the man's mother, or his sister, or his daughter, suckles the infant: the female infant shall become unlawful to her husband, (because the infant becomes, by virtue of the fosterage, the husband's sister, or his sister's daughter, or his daughter's daughter).

And, similarly, if a man marries two female infants (of an age less than two and a half years, either by one contract or by two contracts, there being no relationship by *nusub* or by fosterage between them), and one and the same woman then suckles them both at once, or one after the other: their marriages shall become void (or *batil*), because the man in both cases joined (or united) two sisters in marriage; (in the case where the woman suckled both the infant wives together, both of them became sisters, and their marriage became void; in the case where the two infant wives were suckled one after the other, the case stands thus,—when the first infant wife sucked the milk, then her marriage did not become void; but when the other infant wife sucked the milk, then both became sisters, and their marriages became void); and each of them shall be entitled to half of the dower (fixed at the marriages), and the man shall, according to us (the Hanifites), be entitled to recover the same from the woman (who so suckled the infants) if her intention was wilfully to render the marriages invalid. And wilful intention is (to be inferred) when the woman suckles the infant (or infants) without there being any necessity for the suckling—the infant not being hungry: and her word shall be accepted when she says, "I had no wilful intention to invalidate the marriage." And if the woman who so suckled the two infants is insane, and is, moreover, the man's wife herself, then the man shall not realise from her what he has been obliged to pay on account of dower, and the insane wife herself (whose marriage itself was avoided) shall be entitled to a moiety of her dower, if she so suckled before carnal intercourse was had with her (because by the act of suckling she became the mother of the man's wife, and, therefore, her own marriage was avoided by the act; and if she is not insane, then she shall not be entitled to any dower, because her marriage became cancelled by her own act).

And so also, if the infant wife takes into her mouth the teat of the adult woman (who is his wife), who is asleep, and the infant sucks her milk, the sleeping woman is in the same position as if she had been insane.

And if a man (who is a stranger) draws the milk of an adult woman,

and makes the two infants (who are co-wives of another man) drink thereof, then the husband shall have to compensate each of the two infants (who are his wives) to the extent of a moiety of the dower of each of them, and the husband shall then realise the amounts (he has been so obliged to pay) from the man (the stranger referred to above), if the latter did the act with wilful intent to render the marriages invalid: and this is the correct rule.

1530. (630.) And if a man marries three infants (of less than two and a half years of age each), and then a woman comes and suckles the babes one after another, or she suckles two together, and then the third: then (in both cases) the first two shall become unlawful to the husband; because the husband joined (or united) two sisters in marriage (and their marriages become void) but the third remains his wife, because she became the sister of the first two after their marriage had been rendered invalid: (here there was no joining together of two or more sisters in marriage; because the marriage of the first two had already become void before the third wife was suckled and they had ceased to be his wives).

But if the woman suckles one of the three at first, and then suckles the remaining two together, all three shall become unlawful to him because the relationship of sisters become established (in the three infants) at once.

1531. (631.) And if a man marries an infant (who is less than two and a half years of age) and a female adult; and the adult wife suckles the infant: both shall become separated (because he joined together mother and daughter in one marriage) and there shall be no dower for the adult woman (provided she is not insane) if the husband has had no carnal intercourse with her, because the separation was the result of an act proceeding from herself; but the infant shall be entitled to a moiety of her dower, because she became separated by the act of another, and the husband shall then be entitled to realise the amount of the moiety of the infant's dower from the adult wife, if the latter had wilfully intended to render the marriage invalid; but if she had no wilful intention, the husband shall not be entitled to proceed against her. And after this, it is competent to the husband to marry the infant; because the infant became the daughter of his wife, with which wife he has not had intercourse: but it is not competent to him to marry the adult woman under any circumstances (whether he has had intercourse with her or not) because the adult woman is the mother of his wife (the infant, and the wife's mother is unlawful); but if he has had inter-

course with the adult woman, it shall not be competent to him even to marry the infant (because the daughter becomes unlawful by marriage and intercourse with her mother).

1532. (632.) And if a man marries an adult woman (and has no intercourse with her) and three infants, and the adult woman suckles them one after another, or she suckles one and afterwards suckles the other two together: all of them shall become unlawful; the adult woman and the infant first suckled shall become unlawful, because they became mother and daughter; and the other two shall also become unlawful, because they became sisters and are joined in one marriage; but if she suckles two of them together and then suckles the third, then the adult woman and the first two shall become unlawful (because of the union in marriage of the mother and her two daughters); but the third shall not become unlawful; because the third became the daughter of his wife after the wife had become separated, and before carnal intercourse (because, if there had been carnal intercourse with the adult wife, then the daughter would become unlawful by marriage plus intercourse with the mother).

1533. (633.) And if a man marries two infants (of less than two and a half years of age) and two adult women (and has no intercourse with the latter two); then both the adult women (one after the other) suckle one infant, and then, afterwards, they (one after the other) suckle the other infant: the two adult women and the first infant (*i.e.*, the infant who was suckled by the two adult women first), shall become separated; the adult woman who first suckled (the first infant) shall become separated, because she by suckling the infant who was first suckled (by the two) became mother of the man's wife (the infant), and therefore the marriage of that adult woman became void; and the marriage of the infant who was first suckled also became void because they (the first adult and the first infant) have become united in one marriage (as mother and daughter): the second adult woman (*i.e.*, the woman who suckled the second time) became separated, because by suckling the first infant, that adult woman became the mother of one who had been his wife; (that is to say, when the first adult wife suckled the first infant, then their marriages became cancelled instantaneously, and they ceased to be his wives; then when the second adult wife suckled the first infant, whose marriage had been thus dissolved, then she suckled one who at one time had been the wife of the husband, and she became the mother of that one: and it is a rule that the mother of the

wife is unlawful, whether the marriage should last or come to an end, ar whether there might be sexual intercourse with the wife or not) and there fore the marriage of that adult woman became void. But the secon minor remains his wife, because she became the daughter of his wife (*i.e.* became the daughter of his two adult wives who had suckled her), wh had become separated from him before intercourse, and no other woma is now in his marriage (so that there is no union in marriage of twc prohibited women), and therefore the second infant is not unlawful: (that is, the two adult wives suckled the second infant at a time when they had become *bain* or separate without intercourse; thus when they become foster mothers of the second infant, they had ceased to be the wives of the husband, and the husband had no intercourse with them; therefore this case is similar to the one where a man marries a woman and becomes separated from her without having had intercourse; it is competent to him to marry her daughter after separation. See Fatawai Alumgiree, Vol. I., p. 488, line 20, for the same case, with other illustrations.)

1534. (634.) A man gives his *Oomm-i-Wulud* in marriage to his infant slave (less than thirty months old); she then suckles the slave (her husband) with her milk, being the milk from her master: the woman so suckling shall become unlawful to her master and to her infant husband: she becomes unlawful to the master because she becomes the wife of his son (because the infant sucked milk which was in her from her master, and therefore became his foster son), and therefore, she becomes unlawful to the master (so that the master cannot, now that she has ceased to be the infant's wife, have intercourse with her by *milk-i-yameen*; and he cannot likewise, after emancipating her, marry her); and she becomes unlawful to her infant husband, because she becomes a woman with whom the husband's father (*i.e.*, the master who had become the infant's foster father), had carnal intercourse, and because she became the mother of the husband.

1535. (635.) A man has intercourse with a woman under an invalid (or *fasid*) marriage, (and a separation takes place between them, and the woman is observing her *Iddut* in consequence of the intercourse), and he then marries an infant; the infant is then suckled by the mother of the wife (that is, the mother of the woman with whom he has had intercourse in an invalid marriage): the infant becomes separated, because she becomes the sister of the woman with whom he has had intercourse and who is in her *Iddut* (that is, the marriage with the adult woman is *fasid*, and therefore, if separation had

taken place before intercourse, no *Iddut* would be necessary; but the husband has had intercourse in the invalid marriage, therefore, by reason of the intercourse, the *Iddut* on the woman became obligatory; and after the *Iddut* had become obligatory upon the adult wife, that wife's mother suckled the infant wife, who thus became the sister of the adult wife, and thus another sister became the man's wife before the expiry of the *Iddut* of the first sister): therefore the marriage of the infant becomes void.

1536. (636.) A man marries an infant, and he then marries the paternal aunt of the infant: the marriage with the paternal aunt is not valid: then if the mother of the paternal aunt suckles the infant, the infant shall not become unlawful to her husband (although the infant becomes the foster sister of his paternal aunt) because the marriage with the paternal aunt was invalid: and, therefore, the husband did not unite two sisters (in a valid marriage).

1537. (637.) A man marries two infants (of less than two and a half years of age); then come two (strange) women, having milk from one and the same man (different from the husband under consideration), and one of the women suckles one infant and the other woman suckles the other infant; (the result being that the two infants become half sisters, because the milk of the two women was from the same man) and the two infants shall become separated from their husband, because the two infants become two sisters under one and the same man (that is, in the marriage of one and the same man), and therefore their marriage becomes invalid: and the two women, who so suckled, shall not be liable to pay compensation (or damages on account of the half-dower which the husband shall be obliged to pay to each of the two infant wives) although they might have wilfully intended to cause invalidity of the marriages, because invalidity in the marriage is the result of the infants becoming sisters, and they become sisters (not by the separate act of only one of the women who suckled) but by the joint act of both (the women who suckled); therefore, invalidity was not obtained by the act of any single woman (of the two who suckled) in particular (and each is responsible for her own act, which alone, without the part which the other *took in it, was insufficient to produce* invalidity in the marriage; but in the case where the husband's two wives, as in paragraph 633, suckle each an infant wife, the act of each was sufficient to cause invalidity without waiting for the act of the other), and therefore, there is no liability to damages (against any one of them; but if one and the same woman had suckled the infant wives; then she would have

been liable to damages): just as when a man, when he is afflicted with mortal disease, says to his two wives, "If you both enter this house th you are thrice divorced"; and if they both enter (the house) they sha both become divorced, but they shall not be deprived of inheritance, be cause the happening of the divorce was the result of the act of both o them, and not the result of the act of one of them: (the similarity lies in the question whether they would be deprived of inheritance, and for tha purpose the case is supposed to be one in which the man is afflicted with a mortal disease, and the divorce is such that both wives should jointly do an act in order that the divorce may be caused, and is not such that the act of one of them could bring about its accomplishment).

And if the two adult women have milk from the husband of the two infants (who are his wives), and the rest of the case is as above stated (that is, one adult woman suckles one infant wife and the other adult woman suckles the other infant wife): then it is said, in some places (that is, in some works of authority), that (even in this case) the two adult women shall not be liable to damages; because the invalidity of the marriage cannot be attributed to the act of any one of them in particular (because the act of a single woman could not render the two infants half-sisters); but this view is founded on a mistake, because in this case the cause of the invalidity of the marriages of the two infants, is the becoming of the two infant the daughters of their husband, and the cause of the invalidity of the marriages of the two infants is not their becoming sisters to each other therefore each of the adult women become individually the cause of th invalidity of the marriage of that infant, whom that adult woman suckl (and, therefore, each shall be liable to damages).

1538. (638.) A man marries a woman: then another woman com and gives evidence that she (*i.e.*, that other woman), had suckled both them (*i.e.*, both who are now husband and wife): the unlawfulness sha not be established by her word (alone) although she might be an uprigh (*Adil*) woman; but if the man were to refrain from her (his wife) i would be better: and Malik, on whom be peace, says, that unlawfulness shall be established by the evidence of a sole woman; because the unlaw fulness (by reason of fosterage) is a matter of conscience (*Dyanut*, or righ of God, as contradistinguished from matters affecting the rights of persons or *Hookook-i-Ibad*), and the unlawfulness shall, therefore, be established by the word of a single individual; just as when a person purchases meat, and an upright man informs him that the animal was slaughtered by a *Mujoosee* (infidel, or fire-worshipper), the meat shall be unlawful to him.

But we are convinced of the absence of unlawfulness (on account of the evidence of the sole woman) because the evidence of the sole woman is evidence which relates to the forfeiture (*Zawal*) of the right of ownership of marriage (or *Milk-i-Nikah*); and therefore the unlawfulness shall not be established (by the evidence of a sole woman, the matter under consideration being thus shewn to be of a nature, which is not solely confined to *Dyanut*, but it relates also to the *Hookook-i-Ibad*); in the same way as when a single individual gives evidence of divorce (then the divorce shall not be established by that evidence). And if two women, or one righteous man, gives evidence of this (the fact of suckling); then, similarly, the unlawfulness shall not be established: and so also, if four women give evidence (the unlawfulness shall not be established). And Shafei, on whom be peace, says, that separation shall be effected between husband and wife (in the case aforesaid, which relates to fosterage) by the evidence of four (women): and just as, after marriage, separation shall not be caused between husband and wife, and unlawfulness shall not be established, by the evidence of four women, so also before marriage (unlawfulness shall not be established by the evidence of four women, who might depose to the fact of suckling).

1539. (639.) And if a man intends to propose to a woman (for marriage), and then a (different) woman gives evidence (that is, declares to the man himself, or to others) before marriage, that she had suckled both of them, then the man shall be entitled to falsify her (that is, to disregard what she says, because the statement of one witness is not fit to be acted on) in the same way as if the woman (who pretends to have suckled both of them) should give evidence (of the fact of suckling) after marriage.

1540. (640.) And if two righteous men, or one man and two women give evidence before the husband and the wife, after marriage, it shall not be competent to the wife to remain with the husband, because, this evidence, if given before the Kazee, shall establish fosterage, and so also (shall such evidence establish fosterage) if it is given before the husband and the wife.

1541. (641.) When a man admits in favor of a woman (*i.e.*, as regards a woman), that she is his sister by fosterage, but he does not insist on the admission, it shall be competent to him to marry her; but if he insists on the admission, it shall not be competent to him to marry her. And if, after marriage, he makes an admission to that effect, but does not insist on his admission, separation shall not be effected between them; but if he insists on his admission, then separation shall be effected between them.

And so also, if, before marriage, the woman makes an admission fosterage with a man) but does not insist on her admission, it shall competent to her to give herself in marriage to the man: so that if makes an admission to that effect without insisting on the admission, does not falsify herself (*i.e.*, does not say I made the admission false until she gives herself in marriage to him, her marriage shall be va because marrying before insisting on the admission and before retracti the admission (in express words), is equivalent to retracting her admi sion: and verily, all this has already been discussed in the section relatin to women who are forbidden. (See paragraphs 334 and 335).

And if a woman, after marriage, says, "Verily, I used to admit befo marriage that he was my brother by fosterage, and verily do I say th what I admitted was right, when I made the admission regarding the sam and therefore the marriage is not valid:" separation shall not be effecte between them.

But if, similar to the admission of the woman, the husband afte marriage admits and says, "I used to admit before marriage that she was my sister by fosterage, and I say that the admission was right:" then the Kazee shall effect a separation between them; because if the woman, after marriage, admits that the husband is her brother by fosterage, and insists on her admission, her word shall not be accepted to the detriment of the husband, and separation shall not be effected between them; an so also (separation shall not be effected) when she refers her admission a point of time before the marriage (saying, "I used to admit that he wa my brother by fosterage, and I still insist on the admission;") but if th husband makes the admission after marriage and insists on his admission separation shall be effected between them; so also (separation shall be effected) if he refers his admission to a point of time before the marriag (the woman's admission after marriage having no effect, because the objec is to defeat the husband's right of enjoyment; but the husband's admissi is against his own right, and therefore it is relevant, and shall be accepte

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SECTION II.

ON HIZANUT OR THE RIGHT TO BRING UP (TURBEEUT) A INFANT. (SEE RUDDOOL MOOHTAR, VOL. 2, P. 1042).

1542. (642.) Of all persons who have a right to the *Hizanut* of minor, the person who has the best title is the minor's (own) mother,

whether during the subsistence of her marriage (with her husband, who is the minor's father) or after separation.

Then, if the mother dies or marries another husband, the next best is the mother's mother: and if she (the grandmother) dies or marries, then the father's mother: and if she dies or marries, then the sister by the same father and mother: and if she dies or marries, then the sister by the same mother only: and if she dies or marries, then the daughter of the sister by the same father and mother: and if she dies or marries, then the daughter of the sister by the same mother only. There is no difference in the traditions regarding the order of all these (just stated).

1543. (643.) And after these, the traditions have differed regarding the right of the maternal aunt (that is, the mother's sister) and sister by the same father only: and according to the tradition, reported in the "Book on Marriage" (probably in the work of Mahomed), but whose work is really meant nobody seems to know, because I have consulted various authorities and the same expression, namely, "Book on Marriage" without any reference occurs in all of them, a sister by the same father only is superior to the maternal aunt: and according to the tradition reported in the "Book on Divorce" the maternal aunt is preferable.

1544. (644.) And the daughters of sisters (of all the three kinds) are preferable to the daughters of brothers (of all the three kinds respectively). And the daughters of sisters by the same father and mother or of sisters by the same mother only are superior to the maternal aunts according to all the (three) Imams. And traditions have differed regarding (the rule of) preference between the daughter of the sister by the same father only and the maternal aunt: and the correct rule is that the maternal aunt is to be preferred.

1545. (645.) And amongst the maternal aunts, the first is the maternal aunt by the same father and mother (*i.e.*, mother's full sister); then the maternal aunt by the same mother only; then the maternal aunt by the same father only.

1546. (646.) And the daughters of brothers are superior to the father's sisters: and the order in the father's sisters is similar to what we have stated in regard to maternal aunts.

1547. (647.) And there is no right in the female slave, or in the *Oomm-i-Wulud*, in regard to the *Hizanut* of a minor (that is, if the master begets a child on his female slave, then she being a mere slave is not enti-

tled to the custody of his children, so also if the master gives his fema slave in marriage.)

1548. (648.) And in regard to the *Hizanut* of a minor, the *Zimm* are in the position of the Moslems (that is, the same rules regulate t custody of children amongst the *Zimmees*).

1549. (649.) And there is no right to the custody of a minor in woman who has turned an infidel (*Moortudda*).

1550. (650.) And the right to the *Hizanut* of a minor, which all these females have, is not rendered void by marriage, except when the marriage is with a stranger, (*i.e.*, one who is a total stranger to the minor, or who is of kin to the minor, but is not a *Zee Ruhum-i-Mohurrum* to the minor); but when they marry a man who stands *to the minor* in the relationship of a *Zee Ruhum-i-Mohurrum*, as for instance, when the grandmother (*e.g.*, mother's mother), is married by the grandfather of the minor (*e.g.*, father's father), or when the mother of the minor is married by the paternal uncle of the minor, then the woman's right is not avoided (*e.g.*, take the case of a female infant; suppose her mother's mother has the custody of that female infant: then the female infant's father's father is a *Zee Ruhum-i-Mohurrum* to the infant, that is, he is a relation who is forbidden to the infant: so also in the case of the mother cited in the text; but if the mother of the infant has the custody of the infant, and she marries the cousin of the infant, *i.e.*, father's brother's son of the infant, then that cousin, although a *Zee Ruhum*, or relative of the infant, is still not *Mohurrum*, or forbidden to the infant; in this case the mother shall forfeit the *Hizanut*: the reason is that *Hizanut* is based on love: a mother has greater love than the father; therefore the mother is entitled to the *Hizanut*: and one who is a relative and *Mohurrum* to the minor cannot but have some affection for the infant, and therefore marriage with a relation who is a *Mohurrum* does not avoid the right of *Hizanut*).

1551. (651.) And women (who have the relationship of *Wilad* to the infant, *i.e.*, who have given birth to the infant immediately or mediately, *e.g.*, mother, or mother's mother, or father's mother) have the right to the *Hizanut* of the infant until the infant has (attained age so that he has) no further need (for their assistance): then if the infant has (become *Moostughnee* and has) no further need for their assistance, (the time of *Istighna* is fixed by Khassaf at seven years. See Hedaya with Kifaya, Vol. [illegible] p. 365), so that he can take his meals himself (without requiring any

assistance), or can drink water himself, or can dress himself, or, according to some, if he can himself use water to purify himself after urinating, or after easing himself, then the father has the superior right to the custody of the son, and the mother has the superior right to the custody of the daughter, until the daughter gets her menses, or until, according to Mahomed on whom be peace, she attains the limit of carnal desire (even before getting her menses).

1552. (652.) A woman who has no *Wilad* to the infant (that is, who has not given birth to the infant immediately or mediately. See paragraph 651), has no right to the *Hizanut* of the minor, whether male or female, after the minor is able to take care of himself (and dispense with the guardian's services).

And after the male infant is able to take care of himself, and after the female infant has attained her puberty (*i.e.*, has got her menses) the residuaries (or *Asbat*, who are males) have the superior right; and amongst the residuaries, the nearer is preferred, then the next nearer (and so on).

1553. (653.) And in regard to the *Hizanut* of a female infant, the son of the paternal uncle has no right, (because he is not a *Mohurrum* to her, and one who is not a *Mohurrum* to a female minor, is not entitled to *Hizanut* to her. See Ruddool Moohtar, Vol. 2, p. 1052).

1554. (654.) And when the husband and wife (who are the father and mother of the infant) differ, the husband saying that the mother of the minor (that is, his own wife) has married another husband (and has forfeited her *Hizanut*), and the woman denies the allegation, then the word to be accepted shall be that of the woman; but if she admits that she did marry another husband, and at the same time alleges (and claims) that that (second) husband has divorced her, and that therefore, her right to the custody has reverted to her, then if she does not fix (or name) that second husband, the word to be accepted shall be the word of the woman (because she only wishes to establish her own right, and it is not her object that any particular individual should lose his right); but if she fixes (or names) the second husband, then her word shall not be accepted in the matter of her allegation of a divorce (because when she names a husband, then the result is that some particular individual who has been named, comes to be affected in his rights by her allegation, and, therefore, until the man to be affected by her allegation comes forward or turns up, her word shall not be accepted).

1555. (655.) And if the husband and wife (who are the parents (the infant) differ in regard to the age of the child (son), the mother saying "The son is six years of age, and I have the superior right to control th child;" and the father saying, "The son is seven years of age, and I have tl superior right as regards his custody;" then the Kazee shall not put eith of them upon oath, but he shall look at the boy, and if he sees him able t take care of himself, without the assistance of the mother, so that he ca take his meals himself, and can dress himself, and can take water himself the Kazee shall assign him to his father; but if not, then not; because (the reason why the Kazee shall not put the parties on their oath being that) the Kazee is himself able to ascertain that which renders void (*i.e.*, what puts an end to) the right of the mother, and, that is, the circumstance that the minor can take care of himself.

1556. (656.) And when a man has made *Khoola* (a form of divorce) with his wife, and he has by her a daughter of eleven years of age, and the mother retains (the custody of) the daughter to herself, and the mother is always in the habit of going out of the house at all times, and leaves the daughter to herself (without charging anybody to look after her): then the father shall be entitled to take the daughter (in his custody); because the father is entitled to take the daughter when she has reached the age of desire (or passion); and in consequence of the evil times this tradition is (the one) fit to be relied on (that is, the rule thus laid down that the father can take the daughter in his custody after she has attained the age of desire, even before she has reached her puberty, or got her menses, is to be acted on with greater preference than the rule which allows the daughter to remain in the custody of the mother until the daughter reaches the age of puberty, or gets her menses).

1557. (657.) And when the girl has reached the age of eleven years, then she attains the age of desire (or passion), according to all the (three) Imams.

1558. (658.) A female infant has a father who is indigent, and a paternal aunt (or father's sister) who is in affluent circumstances; the paternal aunt (or father's sister) is desirous of bringing up the infant with her own property (*i.e.*, at her own expense), without any consideration (*Mujjanun*), and she does not prevent the mother of the child from having access to the child, and the mother refuses all this (that is, she does not consent to the child being brought up and maintained by the child's —

father's sister), and demands the hire and maintenance (of the infant) from the father: then the learned lawyers have differed in this matter; but the correct rule is, that the Kazee shall ask the mother either to keep the child to herself without hire, or to give the child to the father's sister.

1559. (659.) And when a woman abstains from keeping the child (that is, when she does not retain the custody of the child), and she has no husband, then the learned lawyers have differed in this matter: the lawyer Aboo Jafer, on whom be peace, and the lawyer Aboo Leith, have said, that the mother shall be compelled to keep the child with her, but our *Mashaikhs* (that is, those lawyers who have not seen Aboo Haneefa), have said that she shall not be so compelled to do so.

1560. (660.) A woman takes an oath in the Persian language, saying, "If I keep the child this night (then, &c.);" and another woman comes and puts the child in the cradle and detains the child there, but the oath-taker suckles the child (without touching the child): the learned lawyers have held that she shall (be held to) have broken her oath (and forsworn herself) because the detention by her of the child is effected by her suckling it (and she, by suckling it, detained it, and therefore violated her oath).

1561. (661.) When the maternal aunt (or mother's sister) of the female minor refuses to keep the female child and look after her, (the infant having no other person possessing a right of *Hizanut* superior to that of the maternal aunt): the lawyer Aboo Jafer, and the lawyer Aboo Leith, on whom be peace, have said that she shall be compelled (that is, in case the maternal aunt is the only near guardian); but the correct rule is that she shall not be compelled (and the infant shall be reared and brought up from the *Byet-ool Mal*), because when, according to the correct rule, the mother shall not be compelled (in case of her refusal to bring up the infant), then it is much more befitting that the mother's sister shall not be compelled.

1562. (662.) A woman goes out of her house, leaving her infant boy in the cradle, and the cradle falls and the infant dies: she incurs no liability; because she did not do an act (to bring about the infant's death) and shall not, therefore, be liable in damages; in the same way as if she goes out of her house, and a thief comes and steals whatever is in the house, she shall not be liable in damages (either in favor of the husband, or whoever owned the house).

1563. (663.) When a girl reaches the position of a woman (*i.e.*, attains her puberty), then, if she is a virgin (one who has not been married),

the father is entitled to attach her (*i.e.*, to protect her) to his person; b... if she is a Syeeba (that is, one who has been married), then he is not entitl... to do so, unless she (the Syeeba) is not safe (*Mamoon*) as regards h... person.

1564 (664.) And when a boy has reached understanding, and his opinion has become formed, and he no longer requires the assistance of his father (in regard to his means of livelihood), then shall not be necessary to the father to attach the boy to his person (*i.e.*, to keep him under his protection) unless the boy is not safe as regards his person; and in that case it is open to him to attach the boy to his person (that is, to keep him under his protection); but the father is not bound to maintain him unless by way of grace.

CHAPTER VIII.

Section I.

ON NUFKA, OR MAINTENANCE.

1565. (665.) (*Note.*—See Ruddool Moohtar, Vol. 2, p. 1059. *Nufka*, according to the dictionary, means what a man expends on his family, or *Ayal*: in Shera, it means food, clothing, and lodging.)

Maintenance relates to (or is the result of) certain things: one of which is the fact of being a wife accompanied with detention (*Ihtibas*).

Therefore a man is liable for the maintenance of his wife, whether sh... is a Moslem, or a *Zimmee*, poor or rich; whether the husband has had i... tercourse with her or not: whether the woman is an adult, or such a mi... that with one like her carnal intercourse could be had; but if the mi... is such that intercourse could not be had with her, then she is not entitl... to maintenance.

1566. (666.) And if the woman whom a man has married is the slav... girl of another, then if she has a separate room (or residence) assigned... her by her master, she is entitled to maintenance (from her husband, ...cause having a separate room for herself from her master, and the husb...h lives in that room with her, she is detained by the husband); if ...n then not.

And so also the *Moodubbura* or the *Oomm-i-Wulud* (if she has be... given in marriage by the master to another man, the latter is bound to maintain her, if the master has assigned a separate room).

1567. (667.) Assignment of a separate residence (by the master to the female slave, *tubweeut*) means that the master should assign a retiring place to the female slave and her husband, without the master calling for the services of the female slave.

1568. (668.) And if the master has assigned a separate residence to the female slave (which means that he should not seek for her services), but it afterwards occurs to him to use her services, he shall be entitled to do so (but the husband of the female slave shall then no longer be liable to maintain her).

1569. (669.) But if the master has assigned a separate residence to the female slave (and the husband remains with her), and she, at times, of her own accord, without being asked by the master, goes to the master and serves him, then her right to be maintained by her husband shall not cease.

1570. (670.) And a female *Mookatuba*, if she marries with her master's permission, is like a free woman (in regard to her right of maintenance), and her right to be maintained by her husband does not depend on the assignment by her master of a separate residence to her (but, on the contrary, she can, after marriage, at once go to her husband, and the master cannot say, "I will give you a separate residence at my house)."

1571. (671.) And when a male slave marries a woman with the permission of his master, he (the husband) is bound to maintain her, so that he will be sold on account of the maintenance once, and then again (that is, he can be sold as many times as will suffice to raise a sufficient amount for the maintenance which has been decreed, and so on, for another and a subsequent decree for maintenance; the purchaser purchasing a 'bag of wind,' as he must know what the law of maintenance in regard to a slave is).

1572. (672.) And there is no maintenance for a sick wife if she has not been sent to her husband's home; but if she has been sent to her husband's home, the learned lawyers have said, that she shall be entitled to maintenance; but it is reported from Aboo Yusoof, on whom be peace, that she shall not be entitled to maintenance (even if she has been sent to her husband's home) if she has not strength (enough) for carnal intercourse.

1573. (673.) And when the woman has been sent to her husband's home, when she is in health, but she falls sick in her husband's home, so that she cannot bear carnal intercourse, then, if the husband has (already

before her sickness) had sexual intercourse with her, she shall be entitle maintenance, because a woman cannot be secure against disease for whole of her lifetime; but if the husband has had no intercourse with woman, and she falls sick (in the husband's home, where she has been because without coming to his home no question of her maintenance ari so that she cannot bear sexual intercourse, then she is not entitled to ma tenance. And if a woman has fainted for a long time, then she is to dealt with as a sick woman (that is, if the husband has not had interco with her, and she comes to her husband's house and faints for a long then she must be dealt with as a sick woman).

1574. (674.) And if the husband has intercourse with the wi her own house, and she then falls sick of a disease, so that she is not to bear intercourse, and then she goes to her husband's house whilst sl sick, and in such a condition; then the husband has the option, if he li to retain her (in his house), and in this case he shall be bound to main her; and if he likes, he may send her back to her home, in which case shall not be liable to her maintenance.

And so also as regards a minor wife (who is not fit for intercou she might be retained, with liability for maintenance, or sent back which case there shall be no such liability).

The learned lawyers have held that there is no liability for mainten against the husband in favour of the sick wife in his house, and in favou the minor wife who is not able to suffer sexual intercourse, except when husband is in a position, notwithstanding the disease (and the minor be profited from her in any way (such as by kiss, touch, &c.), but if not in such a position, she is not entitled to maintenance.

1575. (675.) And if the wife gets sick in the house of her husb after sexual intercourse, and then goes to her father's house, then the learn ed lawyers have said that if she is in such a condition that it is possible for her to return to her husband's house in a *Mohafa* (palkee), or the like, and does not go (to the husband's house in spite of it), she is not entitled to maintenance; but if it is not possible for her to move about (so as to be able to go to her husband, as stated above) then she is entitled to main- tenance.

1576. (676.) And a minor husband is liable to maintain his adult wife: but if both the husband and wife are minors, so that they are not able to have sexual intercourse, then the wife is not entitled to maintenance.

1577. (677.) And if the wife is adult, and the minor husband has no property, then the father of the minor husband is not bound to maintain his son's wife: but the father should borrow, as against the son (and maintain his son's adult wife), and then realise the amount from the son when the latter is in prosperous circumstances.

1578. (678.) And the maintenance which the husband is under obligation (to provide for his wife) is food and dress (or clothing), and lodging: as regards food, the same consists of flour and water, fuel, and salt and oil: and if the woman says, "I will not cook," and, "I will not prepare bread," then, it is said (probably by Mahomed) in the book (in his work, probably called the Mubsoot), she shall not be compelled to cook and to prepare bread, and it shall be incumbent on the husband to provide for her prepared victuals (or food), or to provide her with a person who is able to cook and to prepare bread: and the husband should make a distinction between the wife and the servant-girl (provided by him as aforesaid, as regards the quality of the food, &c., to be provided for both).

1579. (679.) And if the servant-girl of the wife is unable to cook or prepare bread, then the servant-girl is not entitled to maintenance as against the husband of the wife, because the maintenance of the servant is the consideration for services, and when the servant renders no service, she is not entitled to maintenance: but the maintenance of the wife is the consideration for her being detained, and she is detained for the rights of the husband, and she is therefore entitled to maintenance against the husband (whether she cooks, or does any service or not).

1580. (680.) And the lawyer Aboo Leith, on whom be peace, says, if the wife does not cook and prepare bread, then the husband is bound to provide her with cooked victuals only when she is the daughter of respectable persons, and did not herself work in her own family, or if not being the daughter of respectable persons, she has some reason (*i.e.*, she is afflicted with sickness), for which she is not able to cook and prepare bread; but if this is not the case (*i.e.*, if she is not of such a respectable family, or is not afflicted with sickness) then the husband is not bound here to provide her with prepared victuals.

1581. (681.) And there is no amount fixed (as regards quantity of food to be supplied), on account of maintenance, according to us (the Hanifites); and what is obligatory on the husband is a sufficiency of maintenance with propriety (or decency, *maroof*, *i.e.*, without extravagance

and superfluity, or niggardliness and stint); and what is a sufficiency of maintenance differs according to difference of time and place (that is, a female might eat less when a girl, but more as she grows up; so also change of place might bring on an increase of appetite).

1582. (682.) And in the same way as the husband is liable to provide a sufficiency of bread, so also is he liable to provide a sufficiency of meat; because, according to habit bread cannot be eaten unless accompanied with meat.

1583. (683.) The learned lawyers have thus explained the words of God to the effect, "(Give) the average (or medium) of what you feed your family with." (See paragraph 173, text No. 169, of the Koran):—That the best food which a man might provide for his family is bread and meat; and the medium of what a man might provide for his family is bread and olive (oil); and the lowest (*i.e.*, the poorest or the meanest) food which a man might provide for his family is bread and milk.

But as to oil, it is necessary to provide the same, especially in hot countries.

1584. (684.) And all this is according to the practice (or *Oorf*, *i.e.*, habit and custom) of the Arabs. But, according to our practice, the maintenance of the wife differs according to the difference in the circumstances of the people (*i.e.*, the circumstance of poverty and riches), and the difference in times (*i.e.*, cold weather and hot weather).

1585. (685.) And maintenance shall not be measured in dirhems (that is, what is required is a sufficiency as aforestated, and maintenance shall not be estimated and fixed in money; because if reckoned in money, the amount might be more or less): and Shafei, on whom be peace, says, maintenance is fixed in regard to a rich person (that is, when the husband is in affluent circumstances) at (half of a *Saa* or) two *Moods* (a sort of measure, consisting of one and one-third, or two *Rutuls*) and in regard to a person of ordinary (or medium and moderate) means at one and a-half *Moods*; and in regard to a person in want (or in indigent circumstances), at one *Mood*: but this view is not correct; because what is necessary on account of maintenance is a sufficiency, and what is a sufficiency differs with the difference of individuals and times (*e.g.*, a particular woman may eat a small quantity, another a larger quantity, and so also the difference in the seasons).

(*Note.*—A *Saa* is said to be equal to between four and a quarter and four and a half seers).

1586. (686.) But as regards dress. Mahomed, on whom be peace, says, in his book, "And dress is fixed at two shirts and two head hair-bands, and one sheet, every year;" and there is a difference of opinion as to what is meant by 'sheet:' some have said that the 'sheet' is a covering which the woman puts on when she is going out; whilst others have said that the 'sheet' means night-cloth, which is worn in the night; and when Mahomed speaks of "Two shirts" and "Two hair-bands," he means one for each of the hot and cold seasons; and what is to be used for the hot season is thin, so as to be fit for the hot season; and what is to be used for the winter is thick, so as to be fit to keep off the cold; and Mahomed has not mentioned the trousers in connection with clothing for the hot weather, but the trousers are necessary for the cold weather: all this (*i.e.*, the articles of clothing mentioned above) is according to the custom (and practice) of the Arabs: but in our country, what is necessary are trousers, and other articles of clothing, as, for instance, the *Joobba* (female coat), and bed-clothes such as people sleep in: and the *Lihaf* (or quilt) wherewith to cover ones self in the night. A piece of clothing (calculated to combine in a single article) having the quality to ward off the severity of both heat and cold, is a shirt woven at Khurj (a place), of rough silk, and head band of silk. And Mahomed does not mention stockings (*Khoof*), and embroidered sheet, in connection with maintenance; because these are not necessary, except when going out, and it is not necessary for the husband to provide his wife with the means for going out.

1587. (687.) And maintenance is not obligatory except, according to (the condition and circumstances) of affluence and poverty (not of the woman but) of the man (that is, the circumstances of the husband are to be looked at in fixing the maintenance); but some have held that the condition (*i.e.*, the circumstance and position in life) of the woman is to be regarded (in fixing the maintenance); and Khussaf, on whom be peace, says, that the circumstances of both shall be kept in view (in fixing the maintenance); and the explanation of the view of Khussaf is this:—if the man is a respectable person and eats *Huwary* (a kind of food) and fried game, and *Baja* (a kind of dish), but the woman is poor, and was accustomed to eat barley bread in her own family, then the husband shall feed her with bread made of wheat, and with one or two of the *Bajas*.

And if the husband and wife are both in affluent circumstances (*i.e.*, if the husband is rich and the wife also belongs to a rich family), the husband shall be liable to maintenance such as rich persons are entitled to

get, without superfluity in the same (*i.e.*, without being obliged to provide many dainty dishes, *e.g.*, *Pulao* and *Koorma*, will be sufficient, but *Mootunjun* and *Moozafur* are deemed superfluities).

And if the husband and wife are both in indigent circumstances, then the husband shall be liable to maintenance such as poor persons are entitled to get without stint in it (*i.e.*, the husband shall provide rice and *dâll*: and shall not say, "Take *sag*, and *suttoo*, and salt.")

And if the woman is (from) affluent (family) and the husband is indigent, then he shall feed her with bread of wheat, and *Baja*, the husband using his best exertions (to provide his wife with an agreeable meal).

1588. (688.) And the disobedient (or *Nashiza*) wife is not entitled to maintenance. And a disobedient (or *Nashiza*) wife is one who goes out of her husband's house without his permission and without having any right to go out. But if the wife has not (ever since her marriage) surrendered her person (to her husband), and she withholds her person, with a view to realise her dower, then, if her dower is deferred (and not prompt), or if she has made a gift of her dower (if it was prompt) but she still withholds her person, she shall be (considered) disobedient (or *Nashiza*, or rebellious). And if she has (even once) surrendered her person (to the husband after marriage), and then she withholds her person with a view to realise her (prompt) dower, she shall not be (considered) disobedient, according to Aboo Haneefa, on whom be peace: but his two disciples have held that she shall be (considered) disobedient.

[*Note.*—If the dower is prompt and there has been no sexual intercourse, then the woman can refuse to see the husband until the latter has paid her her prompt dower; but if she has had intercourse even once, then the two disciples say she is no longer entitled to deny herself to the husband with a view to enforce payment of the prompt dower: but Aboo Haneefa says she shall be so entitled].

And if the husband lives with her in her house, and she prevents her husband seeing her (without being rightfully entitled so to prevent) then she shall be (considered) disobedient (or *Nashiza*) unless she prevents the husband from seeing her, with the object that the husband should take her to his home or should hire a house for her, in which cases, she shall not be (considered) disobedient.

But if she is living in his house and does not afford him an opportunity (*tumkeen*) to have carnal intercourse with her, she shall not be (considered) disobedient (because she is in his house, and he can compel her and use forcible means to have sexual intercourse with her).

1589. (689.) And if a usurper usurps the wife and carries her away by force, and she then returns to her husband, then the husband shall not be liable for the maintenance for the period which has elapsed (and lost during her enforced absence).

And so also if the wife is imprisoned oppressively (*i.e.*, unrighteously, or by mere *Zooloom*) or on account of (the) right (of another); then it is stated (by Mahomed) in the works named the Asul (otherwise called the Mubsoot) and the Jamai Kubeer, that the husband shall not be liable for maintenance (for the period of the imprisonment), without any distinction (or question), according to Aboo Haneefa, on whom be peace, (regarding the nature of the imprisonment); but according to Aboo Yusoof, on whom be peace, if she is imprisoned on account of debt which she is not able to liquidate, then she is entitled to her maintenance (from her husband, whether he can approach her or not); but if she is able to liquidate the debt, and does not liquidate it, then she is not entitled to maintenance: and this (that is, the liability to maintenance, according to Aboo Haneefa, without qualification and without further question; and the liability to pay, according to Aboo Yusoof, in one case, and not in the other) is when the husband is unable to reach her in the prison (and have sexual intercourse with her); but if he finds in the prison a room, in which he can reach her, (and can have intercourse with her), then the learned lawyers have said that she is entitled to maintenance (from him).

1590. (690.) And if she goes out on a pilgrimage with a relation who is unlawful (or *Mohurrum*) to her, then, according to Mahomed, on whom be peace, she is not entitled to maintenance: but Aboo Yusoof, on whom be peace, says, that she (in that case, *i.e.*, when she goes on a pilgrimage with a *Mohurrum*), shall be entitled to maintenance as of stay, and not as of journey: (and without a *Mohurrum* she cannot go at all on a pilgrimage much less claim maintenance.)

And if she goes on a pilgrimage with her husband, whether the pilgrimage be of the *Furz* or *Nufil* kind, then she is entitled to maintenance as of stay and not as of journey. And the details of this (that is, the details how the husband shall distinguish between her maintenance of stay and her maintenance of journey), are that it should be seen if in the case of stay one dirhem would be sufficient for her maintenance, but in the case of a journey (much more is required, and even) a quarter dinar or more would not be sufficient, then he shall be liable on the journey to a maintenance of one dirhem, and more than that shall not be obligatory on him.

1591. (691.) And if the husband is imprisoned for debt, then if the woman has not failed to come to him, she shall be entitled to maintenance. And if the husband has been imprisoned in the King's jail (as distinguished from the Kazee's jail, or civil jail) out of oppression (*i.e.*, unrighteously), then the learned lawyers have differed in this matter, and the correct rule is, that the wife shall be entitled to maintenance.

1592. (692.) And the woman, who is suffering from (*Rutk*) a disease which prevents penetration, is entitled to maintenance. (See p. 734, Vol. II, of the Fatawai Alumgiree, where the same rule is laid down: and also Vol. II, Rudool Moohtar, p. 1062).

1593. (693.) A man marries a woman and satisfies her dower (or pays it to her), but the husband lives on land which he has usurped, or in a house which he has usurped; and (in consequence of this usurpation) the wife withholds herself from him and goes out of his house: she shall (nevertheless) be entitled to maintenance; because the woman does what is right (by refusing to live in a usurped place), and is not disobedient (*i.e.*, is not *Nashiza*).

1594. (694.) A man goes away from his wife, who (during his absence) marries a different husband, and this latter has sexual intercourse with her; then the first husband returns, and the Kazee effects a separation between her and her second husband: she shall be obliged to observe *Iddut*, and she shall not be entitled to maintenance during her *Iddut*, either from her first husband or from her second husband: she shall have no maintenance from the second husband, because the marriage of the second husband was invalid (or *fasid*), and an invalid (or *fasid*) marriage does not render maintenance obligatory, either before separation or after separation, during the *Iddut*: she will have no maintenance from the first husband, because she has become disobedient (or *Nashiza*).

1595. (695.) A man after sexual intercourse with his wife divorces her thrice, (a divorce after intercourse involves liability to *Iddut*, but divorce before intercourse involves no such liability), and the woman marries another husband before the expiry of the *Iddut*; and the second husband has sexual intercourse with her; the Kazee then effects a separation between the woman and the second husband, (because the second marriage before expiry of the *Iddut* was invalid): the woman shall be entitled to maintenance and residence (*i.e.*, lodging) from the first husband (for the period of the *Iddut*), according to Aboo Haneefa, on whom be peace,

(because here there was no *Nooshooz;* and her doing an illegal act does not disentitle her to maintenance from the husband, who could not have sexual intercourse with her, or use her in any other way, having already pronounced three divorces).

1596. (696.) A woman already married to a man, marries another husband (during the continuance of the first marriage) and the second husband has sexual intercourse with her; the Kazee then comes to know of this, and he causes separation between the woman and the second husband; then the first husband comes to know of this (that is, of the fact of the second marriage and the separation by the Kazee) and he divorces the woman thrice: it shall be obligatory on the woman to observe the *Iddut* in respect of both the husbands, and she shall not be entitled to maintenance (during the *Iddut*) from either of them: there shall be no liability for maintenance in the second husband, because the marriage of the second husband was invalid (or *Fasid*), and there shall be none in the first husband, because she became disobedient to the first husband during the continuance of the marriage, and (by reason of this disobedience) her right to maintenance ceases as long as she has to observe the *Iddut* in respect of the second husband, and when her right to maintenance (in respect to the period of the *Iddut* for the second husband) against the first husband ceases if marriage with the first husband were to subsist, then the first husband shall (*à fortiori*) not (the marriage with him having ceased) be liable to her maintenance for the period of her *Iddut* (for the first husband. In connection with this rule, see Futawai Alumgiree, Vol. 2, pp. 748, and 749; and see also paragraph 764 *post*).

And so also if a woman becomes an apostate from Islam after sexual intercourse—God protect us from such a calamity!—and (consequently) becomes completely separated (*bain*) from her husband, and *Iddut* becomes obligatory on her (on account of the intercourse), she shall not be entitled to maintenance (during the *Iddut*, because the separation was the result of an act which proceeded from the woman herself. See Futawai Alumgiree, Vol. 2, p. 747.)

And so also if a woman has sexual intercourse with her husband's son, or kisses him (with passion), or misbehaves herself in a like way during her *Iddut*, in a case of reversible divorce, (because she by these acts effectually prevents the husband from revoking the divorce, these acts creating unlawfulness of marriage), her right to maintenance shall cease; but if the *Iddut* is in respect of a complete (*bain*) divorce, or three divorces,

then (in case the woman misbehaves herself with the son, as aforesaid), her right to maintenance shall not cease (because the divorce being irreversible, it is not competent to the husband to take her back, and she by doing these acts does not prevent the husband from the exercise of any right: these acts do not cause any new separation: the original separation being still the act of the husband).

1597. (697.) We have thus discussed food and dress (as elements of maintenance).

1598. (698.) Now as regards lodging (*i.e.*, the liability of the husband to provide a residence for the wife, considered as part of maintenance).

The woman's right of residence is to have a separate room assigned to her, in which she might be secure as regards her property (*Muta*), and (so situated) that she might not feel abashed to associate (*Maasharut*) with her husband (in that room).

1599. (699.) And if the husband has a mother or a sister, or a child from a different wife, and these reside in the same place (which the husband has assigned to his wife), and the wife says to her husband, "put me in a separate house," she is entitled to say so, because she is not secure as regards her property (in the same house which is shared by others) and she (also) feels abashed in associating (with her husband) when the room is a common one (*i.e.*, common to many).

But if the place (assigned by the husband to the wife) is a house in which there are rooms, and the husband has assigned to his wife a room which she can lock up and open (at her will), then it is not competent to her to ask for another room, when there is not, about the room assigned to her, any relative of the husband to make her uncomfortable. And if there is no such relative thereabout, but the woman (still) complains to the Kazee, that the husband puts her to discomfort (*Eeza*), and beats her and she asks for residence amongst virtuous people (*Saliheen*), who might acquaint themselves with (and report to the Kazee on) his good conduct or bad ways, then, if the Kazee finds that what she says is correct, he shall warn the husband against his doing so, and shall prohibit the high-handedness (*Taaddee*); but if the Kazee does not find that what she says is correct, (that is, if the Kazee cannot ascertain and cannot say that the complaint is true) then the Kazee shall see, if the neighbours of the house are virtuous people, he shall make her remain there (temporarily), but (still he) shall question the neighbours, and if they report to him that the fact is as the

woman says, then he shall warn (*Zujar*) the husband against the conduct complained of and prohibit his high-handedness; and if the neighbours shall say that the husband does not oppress (*Eeza*) her, then the Kazee shall leave her in the same house. But if, in the neighbourhood, there is nobody on whom the Kazee can rely, then the Kazee shall order the husband to provide for his wife a residence amongst virtuous people.

1600. (700.) And if the husband is desirous of preventing the wife's father, or her mother, or any one of her family from coming to her in his house, then the learned lawyers have differed in this matter: some of them have said that he is entitled to prevent them from coming to her, but he cannot prevent them from seeing her, or talking to her, or from standing at the door whilst the woman is inside the door; and he can prevent her from seeing one who is not (a *Mohurrum*, or one) within the prohibited degrees to her, or one whom the husband can accuse (of misconduct with the wife). Whilst others have said that the husband shall not be entitled to prevent her parents from coming to see her every Friday, but he shall prevent them from taking up their residence with her: and this is accepted by our Mashaikhs, on whom be peace, and the Futwa is according to the same view.

And whether the husband can prevent other than the parents from (coming and) seeing (*Zyarut*) the wife: some of the learned lawyers have said that he can do so; and others have said that he cannot prevent (a *Mohurrum* or) one who stands within the prohibited degrees to the wife, from seeing her every month: and the Mashaikhs of Balkh, on whom be peace, have said, he cannot prevent the *Mohurrum* doing so every year; and the Futwa is according to the same.

1601. (701.) And, similarly, if the woman is desirous of going out to see her (*Moharim*) relations within the prohibited degrees, such as mother's sister, and father's sister, and her own sister, then the rule in that case is according to the views stated above.

1602. (702.) And if the wife has a servant, then her servant's maintenance shall be (assigned and) fixed against the husband: but maintenance for more than one servant shall not be assigned, according to Aboo Haneefa and Mahomed, on whom be peace; whilst Aboo Yusoof, on whom be peace, says, that maintenance for two servants shall be fixed.

The learned lawyers have said that a servant's maintenance shall not be fixed (and granted) unless the woman is the daughter of respectable persons, and the husband does not provide the woman with cooked food.

And if the husband says, "I will serve thee," or "Some of my slave-girls will serve thee," then the correct rule is, that the husband shall not be competent to drive out the servant of the woman from his house (*i.e.*, shall not by so saying make the wife dispense with the services of a servant).

1603. (703.) And the maintenance of the servant is the least (*i.e.*, the commonest), that is, sufficient, and cannot reach (in quality) the maintenance of the wife: and the wife's servant shall be provided with a shirt, and an *Izar* (or sheet, with which to surround the loins) of course cloth, and a blanket of the cheapest kind, and a *Khooff* (the last), because the servant-girl has (occasion) to go out for her mistress's out-door business, such as going to her parents, and the like: and it is not necessary for the wife's servant to be provided with hair band (*Khimar*), because her hair need not be concealed from view (*Aurat*).

1604. (704.) A male Zimmee (an infidel who remains in the Dar-ool Islam) marries one who stands within the prohibited degrees to him (and whose marriage is consequently invalid); and she demands her maintenance: the Kazee shall decree her maintenance, according to Aboo Haneefa, on whom be peace; but his two disciples have said that the Kazee shall not decree the maintenance.

1605. (705.) And (even) the indigent husband is bound to provide his wife's servant with maintenance; but the wife shall not be entitled to receive the maintenance of her servant from the husband, if she has no servant, according to the Zahir-i-Rawayet, whether the husband is indigent or rich.

1606. (706.) The wife demands from the Kazee that he should fix her maintenance against the husband; then if the husband is one with whom many people dine, and who has ample food cooked at his place, he shall not fix a maintenance for her; but if the husband is not so, then the Kazee shall fix a monthly maintenance for her, with moderation (that is, with propriety and decency, or, in other words, without extravagance and excess or niggardliness and stint). Our Mashaikhs have said that the fixing of maintenance by the Kazee differs with the difference in the circumstances of the husband, so that, if he is an artisan, the Kazee shall fix against him daily maintenance, because it may be that the husband is not able at once to pay maintenance for a (full) month; but if the husband is a trader, then the Kazee shall fix maintenance against him month by month; and if the husband is a villager, the Kazee shall fix yearly

maintenance; (in short) the Kazee shall adopt the mode which is easy (for the husband).

1607. (707.) And the Kazee shall direct clothing to be provided twice a year (that is), every six months.

1608. (708.) And when the Kazee shall fix maintenance against the husband, the wife shall not demand from the husband maintenance for the period which has elapsed, before the maintenance was fixed (by the Kazee); because, according to us (the Hanifites), maintenance does not amount to a debt unless the same has been decreed by the Kazee, or fixed by agreement. Therefore, if a woman borrows before the Kazee has fixed her maintenance, and maintains herself (with the money so borrowed), she is not entitled to realise the amount from her husband; but if the Kazee fixes maintenance for her, or if she compromises with her husband in regard to the maintenance for a thing certain every month (*e.g.*, ten Rupees a month, or so much wheat a month), and then if the husband does not provide her with the maintenance (so fixed), so that she maintains herself with her property, or borrows (for the purpose of maintaining herself), then she shall be entitled to realise the amount (so spent by her out of her own property, or borrowed by her) from her husband, whether the Kazee has authorised her to borrow or not. And if she compromises with her husband for what is not sufficient for her (maintenance), then she is competent to withdraw from that compromise and demand (from her husband) what is sufficient.

1609. (709.) And if the Kazee has fixed for the wife clothing every six months, and the husband (in compliance with the decree) provides her with such clothing (that is, provides her with clothing fixed for six months), but the clothing gets lost, or the same is stolen (from her), the Kazee shall not make an order for fresh clothing to be supplied to her until the expiry of the six months; and so also, if she wears the clothes in an unusual (or slovenly) manner, so that the same is torn before the fixed period (of six months); but if she wears the clothes in the usual (and ordinary) way, and they are torn before the time, the Kazee shall make an order for fresh clothes. And if the period (of six months) expires, and the clothes are existing (that is, are still fit for use, and have not been torn), then, if she has not at all used the clothes during this period (of six months), the Kazee shall decree in her favor fresh clothing; and so also if she has worn the clothes, and has besides also worn other clothes, the Kazee shall decree fresh clothes (for the fresh period); but if she has not used other additional

clothes (but has used only those provided by the husband), and the period has expired, the Kazee shall not decree fresh clothing, until the clothes (already provided by the husband) shall get torn.

1610. (710.) And so also is the rule regarding maintenance (*i. e.*, regarding food provided by the husband by way of maintenance), according to the above details: if the food (provided on account of maintenance) is destroyed, or if it is stolen, or if she has (before the fixed period) eaten up the same, and eaten it in a lavish way, so that the same is over before the expiry of the period (for which it was given), the Kazee shall not decree fresh food (on account of maintenance); but if she has (eaten it all up, but) not made a lavish use of the same, and still the food provided (on account of maintenance) is over (before the expiry of the period), the Kazee shall decree fresh food (on account of maintenance).

1611. (711.) And the Kazee shall decree clothing and maintenance, according to the circumstances of affluence of the man, and of his ability (and means): and if the man says, "I am indigent, and am liable to provide such maintenance as the poor are liable for," the word to be accepted shall be his word (with his oath), unless the woman produces proof by witnesses (regarding his affluence). And in regard to the purchase money of the property sold, and in regard to a debt, if the debtor (who is a borrower, or from whom the purchase money is owing) urges the plea of poverty, his word shall not be accepted. And the learned lawyers have held in the same way in regard to dower and suretyship, (that is, in such cases the word of the husband, that he cannot pay dower on account of his poverty or if the surety raises such a plea, the excuse of either of them shall not be accepted).

And some have said that (in case the husband says, that he should be made liable to such maintenance as only the poor are liable to pay) the Kazee shall use the dress (and external appearance and clothing) as a test to decide the question (that is, he shall be guided in the formation of his judgment, on the question of opulence and poverty of the husband, by his external appearance): but if the woman shall establish proof by witnesses to the effect that the husband is rich, the Kazee shall make a decree against the husband for maintenance, such as the rich are liable for; but if both the husband and the wife establish proof by witnesses, then the proof adduced by the woman shall be accepted; but if the woman is not able to establish proof by witnesses, but, on the other hand, asks the Kazee to make

an enquiry regarding the circumstances of the man, the Kazee is not bound to make the enquiry; but if he makes such an enquiry, it is praiseworthy (in him to do so): and if one just (or righteous) man informs the Kazee that the husband is rich, the Kazee shall not accept such information; but if two just (or righteous) men inform the Kazee that the husband is rich, then the Kazee shall decree such maintenance as the rich are liable for, although the two men might not have used the words, "We give evidence:" and in regard to such information, the number (of the witnesses), and justness (or righteousness) of their character is a (necessary) condition; but the (use of the) word "Evidence" (*i.e.*, the formula, "We bear witness") is not a (necessary) condition. But if those two men say, "We have heard that the husband is rich," or "We have been informed that the husband is rich," the Kazee shall not accept this information.

1612. (712.) And if the Kazee should decree against the husband such maintenance as the poor are liable for, and the husband afterwards becomes rich, and the woman then has recourse to the Kazee (and proves her claim in the usual way) the Kazee shall fix against the husband such maintenance as the rich are liable for, because maintenance becomes due from moment to moment, and this rule illustrates another case (of the *Shera*), *viz.*, when a man commences the *Kuffara* (or penitence for having broken a vow, or anything else, where something is to be done by way of atonement) by observing fast (that is, he selects fast as the means of atonement, instead of making atonement with property, *e.g.*, the *Kuffara* of *Zihar* is, firstly, the emancipation of a slave; if there is no ability for this, then secondly, the feeding of sixty poor men; if there is no ability for this, then thirdly, sixty days of fast), but if he afterwards becomes rich (and is in a position to make atonement with property), he is bound to give *Kuffara* from his property.

And so also if the Kazee has fixed against the husband dirhems (on account of maintenance), and the dirhems fixed appear to be insufficient, the Kazee shall increase her maintenance.

1613. (713.) And if the Kazee has fixed against the husband maintenance (in dirhems), and then edibles (*Taam*) became dearer or cheaper, the Kazee shall accordingly alter that order.

1614. (714.) And if the wife says (to the Kazee) that her husband intends to go on a journey; you should call for a surety for maintenance: Aboo Haneefa, on whom be peace, says, the Kazee shall not compel

the husband to furnish a surety; in the same way as the Kazee shall not compel the furnishing of surety (by the debtor) in the case of a debt payable on a fixed date, when the creditor is afraid that the debtor might disappear before the approach of the fixed period (due date): and it is reported from Aboo Yusoof, on whom be peace, that the Kazee shall take surety from the husband for maintenance (when the husband is going out on a journey, as in this case): and according to some traditions, Mahomed, on whom be peace, held a similar view: further, according to Aboo Yusoof and Mahomed, on whom be peace, the period for which the Kazee shall call upon the husband to furnish surety (in the above case) is one month: and according to one tradition from Aboo Yusoof, on whom be peace, the Kazee shall ask the husband, "How long will you remain absent?" and if the husband should say, "I shall remain absent for *one month*," the Kazee shall ask the husband to provide a surety for one month; but if the husband should say, "I will remain absent for two months," the Kazee shall take surety for maintenance for two months, and so also up to one year. And in the case of a debt payable on a fixed date, the learned lawyers have said, by analogy from what has been reported from Aboo Yusoof, on whom be peace, regarding maintenance, that if the Kazee should ask for a surety, it is praiseworthy (or laudable) in him to do so (in the case aforesaid, where the creditor asks the Kazee to take a surety from the debtor). And it is said in the Moontuka, that it is competent for the Kazee to take a surety in case of a debt payable on a fixed date, when the debtor is desirous of going on a journey before the approach of the fixed date. And Shumsh-ool Ayma Hulwai, (sweetmeat-seller), on whom be peace, says, when a portion of the fixed period (in case of a debt payable on a fixed date) remains to expire, and the debtor is desirous of proceeding on a journey, and the creditor moves (or asks) the Kazee to call upon the debtor to provide surety, or prevent the debtor from proceeding on the journey, *then the* Kazee shall not admit the prayer of the creditor, and shall not take surety from the debtor; and Shumsh-ool Ayma Hulwai says, that this rule is according to the view of all the Imams (*i.e.*, Aboo Haneefa, Aboo Yusoof, and Mahomed), and that according to Aboo Yusoof, it is not a worthy act in the Kazee to call for surety in case of a debt payable on a fixed date. This (latter) portion of what Shumsh-ool Ayma Hulwai has said, is therefore a defect in his statement of the rule (because it is well known that Aboo Yusoof holds that when time is fixed for a debt, and the creditor asks the Kazee to take a surety from the debtor, who is about to go on a journey

before the due date, then it is praiseworthy in the Kazee to comply with the creditor's request).

1615. (715.) And if a man stands surety to a woman for her maintenance for "every month," he shall not be surety except for the maintenance for one month (*i.e.*, his suretyship shall not extend beyond a month), and this is similar to the case where a person gives a lease of his house for "every month," in which case, the lease shall be (effectual) for one month, so that the owner of the house is competent to turn the lessee out at the beginning of the next month. And according to Aboo Yusoof, on whom be peace, if a man becomes surety for maintenance for "every month," then the suretyship shall last for ever, (*i.e.*, shall last permanently) reasoning by analogy (*Istehsan*).

And similarly, if a man says to a woman, "Marry so and so, on condition, that I am surety for your maintenance for every month," the suretyship shall last for ever. And if the surety says, "I stand surety to thee on behalf of thy husband for the maintenance for one year," he shall be surety for the maintenance for one year.

And so, if a man says, "I stand surety to thee for maintenance for ever," or "as long as I live," then he shall be surety for the maintenance as long as she remains in the marriage of her (particular) husband (on whose behalf the man stood surety).

1616. (716.) And if a person stands surety for the maintenance for one month or one year, and her husband (after the suretyship) divorces her completely, or by way of a reversible divorce, the surety shall be liable for the maintenance for the period of her *Iddut* (if the divorce takes place within the month or the year, and he shall be liable for the maintenance for that portion of the *Iddut* which falls within the month or the year).

1617. (717.) A man is sued by a woman for her maintenance before the Kazee; the father of the husband says to the woman, "I shall give thee maintenance," and the father of the husband (accordingly) gives her one hundred dirhems; the husband then divorces the woman: it is not competent to the father to get back from her what he has given her on account of maintenance, because what the father gives is just the same as what the son gives.

And if the son (*i.e.*, the husband of the woman) makes a prompt payment (*i.e.*, makes payment in advance) of the maintenance, and then he divorces his wife, it is not competent to him to get back what he has paid promptly.

1618. (718.) When the wife calls upon the Kazee to fix a maintenance for her, and the Kazee does so, but the husband is poor, then the Kazee shall order (or authorise) her to borrow; and when the husband's circumstances improve, proceedings shall then be taken to realise the same from him, and the Kazee shall not imprison the husband for maintenance when he finds that the husband is poor; but if the Kazee does not find that the husband is poor, and the woman requests the Kazee to imprison the husband for maintenance, then the Kazee shall not, at first, imprison the husband, but he shall order the husband to give maintenance to his wife, telling him that he will imprison him if he does not provide maintenance; then, if the woman, after this, renews her complaint a second time or a third time, the Kazee shall imprison the husband. And so also as regards debt other than maintenance.

And if the Kazee keeps him in prison for two or three months, he shall (after the expiry of the two or three months) make an enquiry regarding the circumstances of the husband: and in some places, it is said, that the Kazee shall keep the husband in prison for four months: but the correct rule is that the time of imprisonment (or the time when the enquiry is to be made, whether it is to be made 2, 3, or 4 months after the husband has been in prison) is not fixed, but that, on the other hand, the same depends on the opinion (*i.e.*, discretion) of the Kazee; and if he inclines to think that if the husband was possessed of property he would have suffered distress of mind, and would have discharged the del (*i.e.*, he would not have preferred the inconveniences of a prison), l shall (*i.e.*, may) release him from prison, and shall (*i.e.*, may) not preven the creditor from following (or going after) him (so as to be an incubus o him for the satisfaction of the debt); on the other hand, it is competent to the creditor to follow the debtor wherever he goes; but the creditor shall not make him sit in any particular place (*i.e.*, shall not use wrongful restraint as a means for the realisation of the debt), and shall not prevent him from exercising his rights (and doing his business).

But if the debtor (whether a husband, or otherwise), is rich, then the Kazee shall not release him from prison until he pays the debt and the maintenance, unless with the consent of the creditor.

And if the debtor has present property, then the Kazee shall, out of such property, take (or sequestrate) the dirhems and the dinars, (and not any other property) and from the dirhems and the dinars, he shall pay the maintenance and the debt: (and the Kazee is much more justified in doing so),

because one who has a right (*i. e.*, the creditor), if he can get hold of (or *reach at*) *that which*, in kind, is the *subject matter of his right (that is*, if he has advanced dirhems, then if he can get hold of dirhems which, in kind, are similar to what he had advanced, he) can take it (or appropriate it as of right, in satisfaction of his debt without the intervention of the Kazee, whenever he can find it). And so also in the case of maintenance, the person entitled to maintenance is entitled to get hold of edibles, and can appropriate the same (without the intervention of the Kazee, and without the permission of the debtor).

And if the debt consists of dirhems, and the creditor finds dinars of his debtor, then according to analogy (*Kyas*), it is not competent to him to take (or appropriate) the dinars (because the subject matter of his right consists of dirhems, and these two are not of the same kind, or *jins*), but according to *Istihsan*, he is competent to take (or appropriate, in satisfaction of his right as a creditor, who had advanced dirhems) the dinars.

And according to Aboo Haneefa, on whom be peace, the Kazee shall not sell furniture (or property besides dirhems and dinars) for maintenance and debt: but his disciples have said—and the same view is taken by Shafei, on whom be peace—that the Kazee is competent to sell the same.

1619. (719.) And when the Kazee has fixed maintenance for a woman, for every month, and some months have expired, and the husband has not paid the maintenance, until one of the spouses dies, the right of maintenance shall cease (and past maintenance shall not be recoverable).

But if the woman borrows by the order of the Kazee (after the Kazee has fixed the maintenance), and after that, one of the spouses dies, before the wife has got possession of her maintenance, then the woman's right to realise to the extent she has borrowed shall not be extinguished.

1620. (720.) And if the Kazee has fixed maintenance for the wife, but has not ordered her to borrow, but the woman does borrow; or if, after the Kazee has fixed the maintenance, the wife compromises with her husband on account of her monthly maintenance, for a thing certain, and (in this case of compromise) whether she afterwards borrows or not, the woman is entitled to realise from her husband what the Kazee has fixed, as long as both of them shall be living; but if one of them dies (that is, if the husband dies), it is not competent to the woman to realise the amount from the estate left by the deceased.

1621. (721.) And in the same way as the maintenance fixed by the

Kazee ceases (that is, the right to realise arrears of maintenance fixed by the Kazee is extinguished) on the death of the husband or wife, it may be asked, does it cease by divorce ? The learned lawyers have differed in the matter: some of them have said, it does not cease; and Kazee Imam Aboo Ally, of Nusuf, on whom be peace, says, "I have found a tradition that it shall cease:" and Bakkaly says, that, according to the view of Mahomed, on whom be peace, it shall cease, and that there is no tradition in this matter from Aboo Yusoof, on whom be peace: and Shumsh-ool Ayma, Hulwai, on whom be peace, says, that Khussaf has furnished an additional reason for the extinction of the maintenance that has been fixed by the Kazee, saying (one reason is that), it ceases by the death of the husband or the death of the wife, and (this is an additional reason) it ceases when the husband divorces his wife or separates her completely.

1622. (722.) And if the Kazee has fixed, for a divorced woman, her maintenance for the period of her *Iddut*, and the woman has not realised the maintenance, so that the period of her *Iddut* expires, the question is, does the maintenance cease to be realisable as it does in the case of death ? Some of the learned lawyers have said that the maintenance does not cease to be realisable; and Shumsh-ool Ayma, Hulwai, on whom be peace, says, that when the Kazee fixes for a woman maintenance for the period of her *Iddut*, and she does not realise the same in full, until one of the two parties (the husband or the wife) dies, the (past, or arrears of) maintenance shall cease to be realisable; and so also, the same shall cease to be realisable when the *Iddut* expires before her getting possession of the maintenance.

1623. (723.) When the Kazee fixes maintenance for the wife, and the husband, after that, says (to his wife), "borrow every month so much, and maintain yourself," and the woman does so: she is not competent to realise from her husband, the amount borrowed by her, unless he (goes on to add, and) says, "and you can realise the amount borrowed from me."

1624. (724.) A woman goes to the Kazee and says, "I am so and so, daughter of so and so, who is the son of so and so, and my husband so and so, who is the son of so and so, has disappeared from me, and has not left for me any maintenance," and demands from the Kazee that the Kazee should fix her maintenance for her: this case arises in two ways. If the person who is absent, has property belonging to him at present in his house, such property being of the kind (or *jins*) used for maintenance, such as dirhems and dinars, and edibles, and cloth of the kind used for clothing,

and the Kazee finds that she is the wife of the absentee, the Kazee shall order her to maintain herself with propriety (*Maroof*) out of the said property, without extravagance or stint (*tukteer*), after giving oath to the woman to the effect, "I swear by God, that I did not get my maintenance from my husband, and there does not exist between me and my husband any cause which prevents maintenance, such as disobedience, &c.," and the Kazee shall (also) take from her a surety; because (as a reason for the order of the Kazee on the woman to appropriate the things mentioned above for her maintenance) if the woman can reach at (and can lay hold of and appropriate) her husband's property, consisting of the kind (or *jins*) used for maintenance, she is competent to appropriate that property, secretly or openly, although the husband might not approve of it; therefore the order of the Kazee (that she was to appropriate in the manner aforesaid) is by way of aid to her in asserting (or completing) her right, and such order by the Kazee does not amount to a decree by the Kazee (because one party is absent); but the Kazee shall take from her surety, and shall put her on oath, as an act of kindness towards the absent man.

But if the Kazee does not know of the marriage of the woman (with the absentee), and the absentee has no present (or available) property, and the woman, therefore, establishes (*byyuna*), proof by witnesses of the marriage, the Kazee shall not (according to the Zahir-i-Ruwayet) accept the proof by witnesses adduced by her (because the *byyuna* is directed against a person not represented in Court, and therefore, the Kazee shall neither accept the *byyuna* in proof of marriage nor make an order for maintenance): Hakim-ool Shaheed says, that this is the second view of Aboo Yusoof, and that this is the view of Mahomed, on whom be peace. And Shumsh-ool Ayma Surukhsy says, that the (*byyuna*), proof by witnesses adduced by the woman (in the above case) shall not be accepted according to us (the Hanifites; and according to all the three Imams) without any difference (on the part of Aboo Haneefa, or Yusoof, or Mahomed); and that the same is to be accepted only according to Zoofar, on whom be peace. And Shumsh-ool Ayma Surukhsy goes on to say that Aboo Yusoof, on whom be peace, has (instead of holding two contradictory views), drawn a distinction between the case where the absentee has present (or available) property, and where the absentee has no (available) property; and that where the absentee has present (available) property, the Kazee shall accept the proof by witnesses adduced by the woman, but if he has none, then he shall not accept the same.

And Shumsh-ool Ayma Hulwai, on whom be peace, says, that our Mashaikhs have said that "We were under the impression that the proof by witnesses adduced by the woman against her husband was not to be accepted according to our Ashab (Aboo Haneefa, Aboo Yusoof, and Mahomed) when the (absentee) husband has no present (available) property, and that the same was to be accepted, according to Zoofur, on whom be peace, and we found out that the view of Aboo Yusoof, on whom be peace, in this case, is what Zoofur has said only from Khussaf, and that Khussaf has said 'that the proof by witnesssses adduced by the woman shall be accepted, according to Aboo Yusoof and Zoofur, in the matter of the maintenance being fixed against the absentee, but it shall not be accepted in the matter of marriage: and that viewed in this light (that the proof shall not be accepted in the matter of marriage, but it shall be accepted in the matter of maintenance), the acceptance of the proof by witnesses does not result to the prejudice of the absentee; because if the absentee should appear, and if he should admit the marriage, the woman shall have done right in taking the maintenance (so) fixed (as aforesaid, and awarded during his absence); and if the absentee (on appearing) should deny the marriage, his word shall be accepted, and it shall be obligatory on the woman to reproduce the proof by witnesses in the matter of marriage (and if the marriage shall not be proved, then she shall have to return the maintenance that she has already taken), and that (there is no inconsistency, but on the other hand) it is fit (and valid) that the proof by witnesses should be accepted in regard to one matter (*e.g.*, in the matter of fixing maintenance), and not in the other matter (*e.g.*, in the matter of proving the marriage), as where a man appoints another man his Vakeel to remove his family, or his slave, to a town, and (when the Vakeel was ready to remove them, the husband having gone away in the meantime) the woman (who has to be removed by the Vakeel) establishes (before the Kazee) proof by witnesses that the husband had divorced her (and therefore the Vakeel cannot remove her); and the slave establishes proof by witnesses, that his master had set him free (or emancipated him, and therefore the Vakeel cannot remove him), this proof by witnesses shall be accepted, to defeat the power of the Vakeel, but it shall not be accepted as establishing divorce or emancipation' (because the husband or master is absent)."

And according to Aboo Yusoof, on whom be peace, as reported in one tradition, if the Kazee does not find (or know of) the marriage, and the absentee has no present (available) property, and the woman (in conse-

quence) establishes proof by witnesses in support of her marriage, then the Kazee shall say to her, "If thou art truthful, then I fix maintenance for thee against the absentee, but if thou art false, then I do not fix the maintenance;" so that, if she is truthful, she shall be entitled to the maintenance; if not, then not (the result being that if she is truthful, the maintenance shall be lawful to her, and the husband on his return cannot take it back; and if she is false, the maintenance shall not be lawful to her, and the husband can take it back). And the Kazees, in our times, accept the proof by witnesses in regard to marriage, for the purpose of fixing the maintenance, because the rule to accept such proof of marriage for the purpose of fixing maintenance is one which has been established by *Ijtihad* (there being a difference of opinion; that is, according to Aboo Haneefa and Mahomed, the proof shall not be accepted, but according to Zoofur, and according to Aboo Yusoof's second view, as stated by Khussaf, it should be accepted; and the rule being one which is established by *Ijtihad*, and not by *Kitab* or *Soonnut*, the Kazee may adopt whichever view has been laid down) and human necessity also appertains to the rule (*i.e.*, human necessity requires that the rule should be given effect to).

And according to those who accept this proof by witnesses (that is, proof by witnesses to establish marriage, which proof is accepted as establishing a right to maintenance), the woman is not obliged to establish another proof by witnesses, that the absentee has not left maintenance for her (or has made no provision for her).

And in the same way as the Kazee shall not fix the maintenance against the absentee husband, when he does not know of the marriage (and the absentee has no present property, as stated above), according to Zahir-i-Ruwayet (that is, the traditions of Aboo Haneefa, to be found in the six books of Mahomed), so also the Kazee shall not order the wife to borrow: but Aboo Haneefa, on whom be peace, used to say, at first, that the Kazee shall order her to borrow, but he afterwards retracted from that view.

1625. (725.) And, similarly, if the absentee has left property in trust in the hands of a man, such property consisting of things of the kind (or *jins*) used for maintenance (*i.e.*, consist of dirhems, dinars, edibles, and cloth, see paragraph 724); or if the absentee has left debts owing from some man (or woman), and the woman demands from the Kazee her maintenance to come out of the trust property or the debt: then if the trustee and the debtor admit (that is, the trustee admits) the trust and the marriage, and the (the debtor admits the marriage and) the debt, the Kazee shall order them

to pay maintenance, by way of kindness towards the woman—in the same way as in the case where the property exists in the house of the husband (of the kind, or *jins*, used for maintenance),—after (that is, the order shall be made after the oath) he has put her on her oath, to the effect, "I swear by God, I have not received my maintenance," and the Kazee shall (also) take from her a surety, according to the view of all of them (the three Imams); and the Kazee might himself become surety; and the meaning of the Kazee becoming surety is this, that he shall say, "I am not in a position to confirm thee, but I give thee a loan, so that if thou art truthful, then thou shall not incur any liability, but if thou art untruthful, I will take back the property, (things awarded, as against the trustee or the debtor, for her maintenance)."

And trust property is preferable to debt, to commence maintenance with for the woman (that is, the Kazee shall, in awarding maintenance, make a beginning with the trust property, and not with the debt).

And after the Kazee shall have made such an order, as afore-stated, against the trustee or the debtor, if the trustee says, "I have already (before your order) surrendered the property to her to meet her maintenance," his word shall be accepted, but the word of the debtor (to a similar effect) shall not be accepted, unless accompanied with (*byyuna*, or) proof by witnesses.

And if the absentee owes a debt other than maintenance, and the creditor produces before (the Kazee) a person, who is the debtor of the absentee, or produces a trustee of the absentee, the Kazee shall not order the trustee or the debtor of the absentee, to pay the amount to the creditor, although such trustee or debtor might admit the trust or the debt (that is to say, whilst the Kazee is authorised to make a particular order in favour of the wife for her maintenance, he is not authorised to make a similar order in favour of any other creditor).

And if the trustee gives the trust property to the wife of the owner of the trust (cestui-que-trust) for the purposes of her maintenance, or to his child, or to his parents (for their maintenance); then, if he has given the same to them by the order of the Kazee, the trustee shall not be liable to damages (or compensation to the absentee, on his reappearance); but if he has given the same to them without the order of the Kazee, then the trustee shall be liable to damages; in the same way as if the trustee liquidates with the trust property a debt due from the owner of the property, which was left with the trustee, the trustee is liable to damages.

And if the trustee or the debtor (of the absentee) denies having trust property (or debt), and also denies the marriage, and the woman (conse-

quently) establishes *byyuna* (proof by witnesses) in proof of what she claims (*i.e.*, of her marriage and trust, or debt), her *byyuna* (or proof by witnesses) shall not be accepted; because, as regards property (including debt), what she offers to prove is that the property (including the debt), belongs to the absentee, whereas she has no right to be a plaintiff (that is, to make a claim) on his behalf, and as regards marriage, because, when she offers to prove (or establishes *byyuna*) marriage, she offers to do so against the absentee, whereas on behalf of the absentee there is nobody present to oppose (that is to say, he is unrepresented in Court), and, therefore, the *byyuna* (or proof by witnesses in the latter case, *i.e.*, the case of marriage) shall not be accepted, according to the second view taken by Aboo Haneefa, on whom be peace, and this second view of Aboo Haneefa is the view taken by his two disciples, on whom be peace.

1626. (726.) And if the wife borrows against her absent husband; that is, she purchases edibles on credit (with a promise), that she will pay the price from the property of the absentee; then if she borrows without the order of the Kazee, her husband shall not be liable (for the price of the things purchased by the wife), according to the second view taken by Aboo Haneefa, on whom be peace, and this second view of Aboo Haneefa is the view taken by his two disciples; so that, if the absentee re-appears, she is not entitled to realise the amount (of the price aforesaid) from him.

But if she borrows (that is, makes purchases on credit) by the order of the Kazee, she shall be entitled to realise the amount (of the price aforesaid) from her husband.

1627. (727.) And in regard to (*Mufkood*) one who is absent, and whose whereabouts are not known, the rules regarding him, in all the details, are the same as those in regard to an absentee who is not a *Mufkood*.

1628. (728.) And as against an absentee, his furniture (other than of the kind or *jins* used for maintenance) shall not be sold on account of maintenance.

1629. (729.) And when a man sends to his wife some cloth, and he afterwards (when a question regarding it arises) says, the same was (sent) on account of dower, or says, the same was on account of clothing (which he was bound to provide as maintenance), but the woman says, the same was a present: the word to be accepted shall be that of the husband. And so, if he gives her dirhems, and says, afterwards, the

same were paid on account of maintenance, but the woman says, the same were given by way of a present: the word to be accepted shall be that of the husband (that is, on oath, in the absence of a *byyuna*).

And so also, if against a man there are debts (owing to the same individual) of several kinds (*e.g.*, unpaid purchase money, and money borrowed, &c.), and he pays something (to that individual), and he afterwards says, that the payment was on account of such and such a debt, the word to be accepted shall be his word; because he is the person who makes the creditor owner of the money paid; and so also is the husband, that is, also the husband makes the wife the owner of the things sent, as aforesaid, and, therefore, his word shall be accepted); except when the woman establishes proof by witnesses that the husband sent her those things by way of a present. And if both (the husband and the wife) establish proof by witnesses, then the *byyuna* (or proof by witnesses on the question, whether the amount sent was in satisfaction of the dower, or by way of present) adduced by the husband shall be accepted.

And so also if each one of them establishes proof by witnesses to prove the admission of the other (on the same question as set forth above) then the *byyuna* to be accepted shall be that of the person who makes the other owner of the thing.

1630. (730.) And so also when the husband and wife differ, after the maintenance has been fixed (by them amicably; because if it has been fixed by the Kazee, the question can be settled without any difficulty by referring to the record) as regards the amount fixed, or if they disagree as regards the period which has elapsed (*i.e.*, as regards the period for which maintenance is due) after the Kazee has fixed the maintenance (because unless the Kazee fixes maintenance, the woman is not entitled to past maintenance, see paragraph 708), the word to be accepted shall be that of the husband (on oath, in the absence of witnesses), because he denies the increase, (or excess over the admitted matter, *e.g.*, where the question is between four and six months, then the two months constitute the excess), but the *byyuna* (or proof by witnesses to be accepted) shall be that of the woman, because the woman claims the increase (or excess).

1631. (731.) A man has a single head-band, he shall not be compelled to sell the same on account of maintenance; because a man cannot be compelled to sell the clothes on his person for any kind of debt, and so also in the matter of maintenance.

1632. (732.) And as against the husband who is present, his furniture shall not be sold (by the Kazee) on account of debt and maintenance, according to Aboo Haneefa, on whom be peace (as also in paragraph 728); because to sell one's property for his debt is to deprive him of the right to exercise dominion over his property (and therefore his debt must be realised by putting compulsion on him, *i.e.*, by imprisoning him) and Aboo Haneefa does not allow a man to be deprived of his right to exercise dominion over his property.

But his disciples, on whom be peace, say that his furniture shall be sold for either debt or maintenance.

1633. (733.) And if a woman shall have received, in anticipation, the maintenance for a period, and if she dies before the expiry of the period, it is not competent to the husband to get back any portion of the maintenance, according to Aboo Haneefa and Aboo Yusoof, on whom be peace: but Mahomed, on whom be peace, says, that if the amount received in anticipation is in existence, then the heirs of the wife shall have surrendered to them the proportionate amount for the past period (that is, for the period she was alive), and the remainder shall be returned to the husband; but if the amount received in anticipation on account of maintenance is not in existence, then the husband's share shall be awarded from the inheritance (or estate) of the woman, because the husband made pre-payments of maintenance in order to put an end to an obligation, and the (right to) maintenance ceased by the death (of the wife), and therefore the husband shall get back what he has paid in anticipation, because the obligation ceases; just as in the case of a man who pays maintenance to a woman with the view of marrying her, but the woman dies (before the marriage could take place), the man shall then be entitled to take back what he has paid on account of maintenance.

1634. (734.) And if a man gives maintenance to his wife, whom he had divorced thrice, such maintenance being given for the period of her *Iddut*, consequent upon the divorce pronounced by the *Moohullil* (or legaliser), and the same having been given with a view that the man should marry her after the expiry of the *Iddut* for (or consequent on the divorce by) the legaliser, but the woman does not give herself in marriage to the man; then the Sheikh-ool Imam Aboo Bakur Mahomed, son of Fuzul, on whom be peace, says, if the man has given her dirhems, he shall be entitled to get the same back from her, unless the same have been paid as a present; and other Mashaikhs have said, if he gives maintenance and makes a condi-

tion, saying, "I give thee maintenance on condition that thou shalt marry me," and then, if she gives herself in marriage to him or not, it shall be competent to him to get the maintenance returned by the woman; but if he does not say so (*i.e.*, does not express the condition), but it appears inferentially that he maintained her with this object, then some have said that he shall not be entitled to get the maintenance back from her.

And the great, and the master Sheikh-ool Imam Zuheerooddin, on whom be peace, says, that he shall be entitled to get back the maintenance in every case (whether there is a condition or not, and whether the woman marries him or not, and whether any inference could be drawn or not), because the maintenance given was a bribe, unless he expressly states it to be a present in which case it is not recoverable: see also paragraph 460).

1635. (735.) A woman has an indigent husband, but she has a rich son: the Kazee shall say to the son, "Give him a loan," and he shall compel the son to lend him; then if the son refuses to do so, the Kazee shall order the maintenance (of the mother) to be paid by him.

1636. (736.) A woman says to her husband, "Thou art released from my maintenance for ever, as long as I shall continue thy wife;" then if the Kazee has not already fixed a maintenance for her, the release by her shall be void; because she released him before the obligation came into existence (that is, maintenance for a time prior to the order of the Kazee not being recoverable, the release here is before the obligation to pay a sum or thing certain had come into existence), and if the Kazee has fixed such and such sum for her maintenance every month, against the husband, and the woman afterwards says, "Thou art released from my maintenance for ever, as long as I am thy wife," the release shall be valid in regard to maintenance for one month, and not for more; and if she has released him after the expiry of a few months (from the date the Kazee had fixed the maintenance), then the release shall be valid for the past period (that is, for the maintenance of the period before the release), and not for the remaining period (that is, not for a period coming after the release); in the same way as when a person gives a lease of his house monthly (or for every month) for such and such (rent), or gives a lease yearly (or for every year) for such and such (rent), and some portion of the year or some portion of the month expires, then the lease shall be valid for the first month or for the first year (and the contract shall not be binding for other months or years; that is, a man gives a lease to another, saying,—"I give you a monthly lease:

you shall have to pay me so much monthly, as long as you reside;" here the period is unknown, because it is not known for what period certain the lease is to last; then, the lease shall be valid for a month, because that is certain according to the contract: but if he says, "I lease the house to you for six months, for so much rent monthly," then the lease is valid for six months).

1637. (737.) And it is stated in the Book on Compromise (in the work of Mahomed), that a man divorces his wife, and afterwards the woman compromises with the man for her maintenance during the period of her *Iddut* in lieu of something (certain); then, if her *Iddut* is to be reckoned by months, the compromise is valid; but if by menses, then the compromise is not valid (because, in the former case, she can ascertain with precision the period for which the maintenance is to be provided; because that period is three months for an *Ayeesa*, and two months for a slave girl: but in the latter case the number of months is uncertain, because she might be in her irregular courses).

And if the woman who is observing her *Iddut* compromises regarding her residence for certain dirhems, the compromise shall not be valid in both the cases (*i. e.*, whether the *Iddut* is reckoned by months, or courses), because residence is the right of God, and, therefore, the giving up of that right by the woman is not valid: (see paragraphs 459, and 462, being texts of the Koran numbered 455 and 458, where residence is prescribed in the Koran, and it is the right of God, in so far as God makes the command, to which He expects obedience: it is also the right of the woman, in the sense that she is to be benefited by the command; but she cannot give up her own right because that involves the giving up of the right of God).

1638. (738.) A man is accused with a woman, whose pregnancy becomes visible, and her father gives her in marriage to the man, and the husband refuses to maintain her: then Sheikh-ool Imam Aboo Bakur Mahomed, son of Fuzul, on whom be peace, says, that if the husband admits that the pregnancy was by him, the marriage is valid, according to them (that is, the three Imams), and he shall (consequently) be compelled to provide a maintenance for her; but if he does not admit that the pregnancy was by him, then the marriage shall be valid, according to the view of Aboo Haneefa and Mahomed, on whom be peace (because they hold that the marriage of a pregnant woman, who has conceived by *Zina*, is valid; so that any man can marry her; but if the pregnancy was not by the

husband, he is not entitled to have intercourse with her until delivery: but if the pregnancy was by the husband, then he can have intercourse without waiting for delivery. But according to Aboo Yusoof, the marriage itself shall not be valid if the pregnancy was not by the husband), but the marriage shall not be valid according to the view of Aboo Yusoof, on whom be peace, and (in the aforesaid case, that is, when the husband does not admit that the pregnancy was by him, then) the husband shall not be compelled to provide her with maintenance, according to the view of all the three Imams, because, according to Aboo Yusoof, on whom be peace, the marriage is invalid, (and, therefore, the husband shall not be bound to provide a maintenance), because in an invalid marriage there is no liability to maintenance; and according to Aboo Haneefa and Mahomed, because it is not lawful for the husband to have carnal intercourse with her until she is delivered, (and, therefore, there is no detention or *Ihtibas* in the proper sense of the term). And shall the husband be liable for the price of the water which is used (by her) for bathing and *wuzoo* (purification before prayers)? On this question, the Mashaikhs of Balkh, on whom be peace, have said that the husband shall be bound to pay the price; and we have mentioned this in the Book on Prayers.

1639. (739.) A woman dies without leaving property (from which her funeral could be provided for): Aboo Yusoof, on whom be peace, says, the funeral (*Kufun*) is obligatory on the husband, and Fatwa is given accordingly.

The principle, according to Aboo Yusoof, on whom be peace, is that, whoever is obliged to provide maintenance (for one) when alive, is obliged to provide for the funeral in case of death: but Mahomed, on whom be peace, says, that the husband is excepted from this rule. And whoever is not obliged to provide maintenance (for another) during life is not obliged to provide for the funeral after death, according to the view of them all (*i.e.*, all the three Imams).

1640. (740.) A man says to another, "Give a loan to my wife, and give her, on account of maintenance every month, so much," and the person so ordered afterwards says, "I have provided her with maintenance," and the woman supports him: the person so ordered cannot recover from the husband (on account of maintenance which was provided before the request) unless the Kazee has fixed for her for every month ten dirhems (or so); and in this (latter) case if the woman admits that the person

ordered has provided her with maintenance, her word shall be accepted (and the Kazee shall make a decree in favour of that person) because the woman has taken the maintenance by the order of the Kazee (and, therefore, the person on whom the order has been made can recover from the husband) : but in the first case (when without the order of the Kazee for maintenance, the third party makes the advance at the request of the husband), the woman takes the maintenance with the object of establishing a debt against her husband (*that is, the result is that the liability for the debt is thrown* on the husband), and therefore her word shall not be accepted.

And this is the rule in the case of a minor son (*i.e.*, in the case where the father asks a third party to spend a certain amount to maintain his minor son).

1641. (741.) A man says to another, "Maintain my wife and children (*Ayal*)," and the person so asked maintains them with propriety (or *Maroof, i.e.*, decency): Sheikh-ool-Imam Shumsh-ool-Ayma Sarukhsy, the great, on whom be peace, says, it is competent to that person to recover from the person *who made the request what he spent on account of maintenance* (even if the Kazee should not have previously fixed the maintenance. In paragraph 740, the maintenance was provided for prior to the request of the husband, and therefore it was held not to be recoverable at the instance of the third party : but if the Kazee makes a decree, then the woman is entitled to borrow as against the husband. In paragraph 741, the third party has provided maintenance after the request of the husband).

1642. (742.) Inability to provide for maintenance does not create a right of separation: but Shafei, on whom be peace, says, that the woman is entitled (in such a case, that is, in a case where the husband is unable to provide the wife's maintenance) to demand from the Kazee that he should effect a separation between them, and the separation (so) effected by the Kazee shall be a cancellation (*Fuskh*) of the marriage (and not a divorce).

And this difference of opinion exists when the husband is unable to pay the prompt dower before sexual intercourse (that is, according to Aboo Haneefa, if the husband is unable to pay the prompt dower before sexual intercourse, the wife is not entitled to ask for a separation; so also, if he is unable to pay it after sexual intercourse: but according to Shafei, if the wife demands her prompt dower before sexual intercourse, and the husband is unable to pay it, she is entitled to ask for a separation; but if she demands it after intercourse, and the

husband is unable to pay it, then, even according to Shafei, she is not entitled to ask for a separation), so that, if the Kazee effects a separation between the husband and the wife (either in case the husband is unable to pay maintenance, or unable to pay the wife's prompt dower, before intercourse), and the Kazee is of the Shafei school, his decree shall be given effect to (even according to the Hanifites); because the Kazee has (by making the decree in such a case) made a decree in a matter on which there is no text of the Koran, or tradition of the Prophet, or *Ijma*, but in which the governing rule is deduced by *Ijtihad*, and therefore his decree shall be given effect to according to all (*i.e.*, the Hanifites, Shafeites, Malikites, and Humbulees. When there is no text of the Koran, or the Hudees, in a case, and when there is no *Ijma* either, and consequently the governing rule is to be deduced from *Kyas*, or reasoning by analogy, then, if the *Illut*, or reason of the rule which should govern the case, is to be found in the Koran, the Hudees, or by *Ijma*, the rule required for the case can be deduced without difficulty, and when deduced it is as convincing as if it had been laid down in the Koran, or the Hudees, or by *Ijma*: but when the reason for the rule is not so found, then the Jurists or Moojtuhids), *i.e.*, the Imams Aboo Haneefa, Shafei, Mallik, and Humbul, were reduced to the necessity of finding out a reason from which the rule in question could be deduced, and each of the Moojtuhids might assign as a reason for the rule what is not accepted by the others: hence the difference between the Moojtuhids. It follows from this, that a rule deduced by such an uncertain mode of reasoning might be right or might be wrong; but if a particular Kazee, whichever Moojtuhid he might be a follower of in conscience and religion, accepts a particular rule, then his acceptance of the rule is sufficient to give it an authority for its promulgation, so as to make it binding on the followers of all the Imams): but if the Kazee is of the Haneefa school, it is not fit that he should make a decree contrary to (the tenets of) his school, unless he is a Moojtuhid (*i.e.*, is one who, as defined in the Shera, is able to deduce rules on recognised principles), and unless (also) his *Ijtihad* leads him to the conclusion that the doctrine which is not accepted by the followers of his school is correct: but if the Kazee acts contrary to the accepted rule of his school, without *Ijtihad* (that is, without his being a Moojtuhid, or in the event of his being a Moojtuhid, without exercising his mind, and without thinking over the matter, so as to evolve a conclusion according to the rules prescribed for *Ijtihad*), then according to Aboo Haneefa, there are two traditions on the question whether his decree (contrary to the tenets

of his own school) is to be given effect to (that is, according to one tradition, such decree should be enforced, because the Kazee's authority is sufficient to make a rule binding in which a difference of the nature above referred to exists, but according to another, it should not be enforced, because the Kazee has made the decree without making *Ijtihad*): and (as in the case of maintenance) so also in regard to every other matter (which depends on *Ijtihad*) on which there is no text of the Koran, or saying of the Prophet, or *Ijma*, but in which the rule is deduced by *Ijtihad*, and in which consequently there is a difference: (that is, in all such matters, the Kazee, if not a Moojtuhid, shall not act contrary to his school; and if he is a Moojtuhid, and if he exercises his mind, and acts up to the rules of the *Ijtihad*, then he can pronounce a decree in conflict with his own tenets).

And if the Kazee (professing the Haneefa tenets), instead of himself making (contrary to the tenets of his school), a decree (that separation should be effected between the husband and the wife) directs another Kazee, who is of the Shafei school, to make a decree in the particular case (betwen the husband and the wife, effecting separation between them), then if the Kazee (professing the Hanifite tenets) is not authorised (by his appointment) to appoint somebody as his deputy, then the decree passed by the Kazee of the Shafei school shall not have effect given to it; or if he has such authority, but he himself, or the Kazee to whom he has entrusted the case, has taken something in the case (*i.e.*, has taken a bribe), then the decree of the Shafei Kazee shall not be given effect to according to all; because the decree of the Kazee, in a matter in which he has taken a bribe, is void according to all; but if nothing has been taken (that is, if no bribe has been taken), and the Kazee, who has been so directed, as aforesaid, effects a separation between the husband and the wife, the separation so effected by him shall (according to everybody) be valid.

(*Note.*—All that has preceded relates to a case where the husband is present.)

But if the husband (who has no ability to pay maintenance, or who is unable to pay the prompt dower, before carnal intercourse, as stated above) is absent, and the woman submits the question (that her husband is unable to maintain her) to the Kazee, and she establishes (*byyuna*) proof by witnesses that her absent husband is unable to maintain her, and demands from the Kazee that he should effect a separation between them; then, if the Kazee is a Hanifite, we have stated what he ought do; but if he is a Shafei, and if he effects separation between them, then the Mashaikhs

of Samarcand have said that "The separation effected (or the decree) by the Kazee shall be valid, because the Kazee (by directing separation) shall have (in effect) made two orders; one is that he shall have decreed separation in consequence of inability (on the part of the husband) to maintain (his wife), and the other is, that he shall have made a decree in a matter which affects an absentee, and either of these two matters, is (*Moojtuhid-fee*, or is) a matter in which there is no text of the Koran or tradition of the Prophet, or *Ijma*, and in which there is a difference of opinion requiring a Moojtuhid to settle the point; and that according to us the decree against the absentee is not valid, but if the Kazee does make a decree, then according to (Azhur-i-Ruwayet or) the more apparent of the traditions (from Aboo Haneefa), his decree shall be given effect to, and, therefore, the decree made by the Kazee of the Shafei school is valid." But Sheikh-ool Imam Zuheerooddin, the great and the master, on whom be peace, has said, that this separation (so effected as aforesaid), by the Kazee of the Shafei school, is not valid, because a decree against the absentee is only valid, according to Shafei, on whom be peace, and the same is only operative according to one of two traditions from Aboo Haneefa, on whom be peace, when the thing sought to to be proved (*viz.*, the inability of the husband to maintain his wife) is proved, but the thing sought to be proved, which is the inability of the husband to maintain his wife, is not proved here, because property (is uncertain in its duration, *i.e.*, it) comes in the morning and goes in the evening (and, therefore, it cannot be said as to the absentee that he is unable to maintain his wife at the time of the decree) and it is possible that the absentee may be rich, but the witnesses may not be aware of the fact, in consequence of the husband being at a distant place from where the witnesses are, and the witnesses might simply be speculating (and making a guess) in this matter; and, therefore, when the Kazee knows all this (that is, he knows that the witnesses' statement as to the husband's present inability is a mere speculation), his decree shall not be valid (and, therefore, according to Oostad Zuheerooddin, the decree made by the Kazee is all nonsense, according to the very tenets of Shafei, whose follower the Kazee is, and, therefore, that decree shall not be enforced).

1643. (743.) A man resides on royal lands, meaning thereby that the land is the Sovereign's private property: and the man also takes money from the Sultan (*i.e.*, without being the servant of the king, the man is supported by the Sultan); the wife says, "I shall not reside with thee on the royal land and I shall not eat of thy property:" the learned

lawyers have said, it is not open to her to say so, and the sin of the life the husband leads (living on royal lands and on royal charity), is in her husband, and if the woman refuses to live with him, she shall be considered disobedient (or *Nashiza*).

And verily have we stated before (see paragraph 693), that if the husband is residing on usurped land, and the woman refuses to live with him (on such land), she shall not be considered disobedient, and she shall be entitled to (separate) maintenance from her husband, and the reason of that is, that usurpation is absolutely wrongful (or unlawful, *i.e.*, *Huram*) without there being any sort of doubt regarding the same; contrary to the (case of the) land of the Sultan and his property (which land and property might have been lawfully or unlawfully acquired. *Note.*—See Fatawai Alumgiree, Vol. III, p. 403. The Imam or the Sovereign is only entitled to so much out of the public funds as will enable him and his family to live with comfort, in order that he may avoid temptation regarding his subject's property. Accordingly, Huzrut Aboo Beker was allowed, out of the *Bytool Mal*, four hundred dirhems per annum, equivalent to about Rs. 105 of the Company's coin: and Huzrut Ally was allowed out of the *Bytool Mal*, per diem, a large cup of *Sureed*, which was a kind of eatable; and according to some tradition, Huzrut Ally fixed for himself five hundred dirhems per month).

SECTION II.

ON DIVISION OR PARTITION (*KASM*).

1644. (744.) What is obligatory on the part of husbands in regard to their wives is (the observance of) justice (*Adul*) and equality amongst them in matters lying within the husbands' power, and those matters consist of living with them with the object of giving the wives their company and their affection (*Mowanisut*), and not in matters which do not lie within their control, such matters being (concentration of) love (*Hoobb*), and sexual intercourse; because love is a function of the heart and sexual intercourse springs from pleasure, and neither of these is under the will of the husband. And the Prophet of God, on whom be the mercy of God, has pointed to this when he says, "Justice and equality between wives consist in what lies within my power to divide amongst them: and (Oh, God!) do not make me answerable for what does not lie in my power," (See paragraph 761, text of the tradition numbered 152.)

1645. (745.) If a free man or a slave has under him two wives, it is obligatory on him to observe equality between them: he should, therefore, live with each one of them one day and one night, or three days and three nights; but he shall have the full scope of his inclination with whom he is to commence to live first.

1646. (746.) And in the matter of division, a *Syeeba* (a woman who has already been married or who has already had sexual intercourse) and a *Bakira* (*i.e.*, virgin), and a woman who is about to attain her puberty, and a woman who has attained her puberty, and a woman who has understanding, and a woman who is insane, and a woman who is a Moslem, and a woman who is a *Kitabya*, stand upon an equal footing.

And so also a husband who is in health, and one who is sick, and (a *Mujboob* or) one whose male organ has been cut off, and one who has been castrated, and one who is impotent, and one who has attained his puberty, and one who is about to attain his puberty, and one who is a Moslem, and one who is a *Zimmee*, all stand on an equal footing (that is, all these are equally obliged to observe equality, justice, and division amongst their wives).

1647. (747.) And a new wife and one married long ago have equal right to the division, according to us (all the three Imams), whether the new one is a virgin or a *Syeeba*: so that when a man has lived with his new wife for three or seven days, he must live with his old wife for the same time: but he has the option to commence with the new wife.

Shafei, on whom be peace, says, if the new wife is a virgin, the husband must (at first) live with her for seven days, and after this (period of seven days), he shall observe equality between the new and the old wives (those seven days not being taken into account), and he shall (after those seven days) remain with each one of them for one day and night (that is, for an equal period): and if the new wife is a *Syeeba* (one who had been married before) then he shall remain with her three days and (three) nights, and then after that he shall observe equality between them.

1648. (748.) And if a man has under him a female slave (who is married to him), or a *Moodubbura* (likewise married), or a *Mookatuba* (likewise married), or an *Oomm-i-Wulud* (likewise married), and upon them (*i.e.*, in addition to them), he marries a free woman, then the free woman is entitled to two days, and the female slave is entitled to one day, (and so also the *Moodubbura* and the *Mookatuba*).

And if he shall have lived with the female slave (to whom he has been married) for one day, and then the female slave is emancipated (by her master, and consequently becomes a free woman), then he shall live with the other free wife (who has been always a free woman) only for one day (because both are now free).

And if he has lived with the wife, who is a free woman, for one day (out of the two days), and then the slave wife becomes emancipated (by her master), he shall go to his wife so emancipated (instead of completing two days with the former, because both are now free).

1649. (749.) And if a man remains with one of two wives for a longer period (and does so), with the permission of the other wife, it is lawful for him to do so: and the latter wife (if she has given a general permission *for him to stay longer with the former, then she*) can revoke such permission, and the permission accorded by her shall not be binding on her.

1650. (750.) And if a woman offers (promises) to her husband a present, on condition of his increasing her portion of the time allotted to her by one day, and the husband does so, it is not obligatory on the woman to make the present, and it is competent to the woman to take back the property (given by her by way of a present).

And so also, if she has released him from a portion of the dower, or if the husband makes an increase in the dower, or if the husband offers her a present, on condition that she might allow him to remain with another wife, during the day which is her portion, then the same is void.

1651. (751.) And if the Kazee has directed the husband to observe division and equality, but the husband (instead of observing equality), commits oppression (that is, fails to carry out the order), and the wife brings up the matter before the Kazee, then the Kazee shall inflict pain (punishment) (*Aujaa*), in consequence of the husband having adopted an illegal course (and of his having failed to observe equality, notwithstanding the injunctions of the Kazee), and shall order him to do justice (and observe equality).

1652. (752.) And if the husband lives with one wife for *one month*, whether before or after the wife has had recourse to the Kazee (but the Kazee has yet made no orders), and then the other wife has recourse to the Kazee (complaining that the husband is not living with her), the Kazee shall direct the husband to observe equality between his wives in future,

and the period that has elapsed shall go for nothing, so that the wife last mentioned shall not be entitled to demand that the husband should remain with her for a like period (as compensation for the month already passed by him with the first-mentioned wife, but there shall be a new beginning).

1653. (753.) And if a man has a wife who is sneered at on account of her old age (this circumstance of being sneered at is not a necessary part of the rule), and the husband intends to change her for a young woman (*i.e.*, he intends to bring a young wife in lieu of the old one by divorcing her) and then the old wife proposes that he might retain her (instead of divorcing her), and (also) marry another wife, and that he might live with the new wife for a number of days, and with her, the first wife, for one day, and the husband marries (a new wife) on this understanding: this is valid: and in this matter the text of God has descended, *viz.*—"If the wife fears that her husband shall get displeased with her, or shall turn away from her, and so forth." (See paragraph 149: text of the Koran, numbered 145).

1654. (754.) And if the husband goes upon a journey with one of his two wives, without casting lots, this is valid according to us (the Hanifites), but casting lots is the better course. But Shafei, on whom be peace, says, that it is not lawful for the husband to go upon his journey with one of his wives without casting lots.

1655. (755.) And if the husband goes upon a journey with one of his two wives, and when he comes back from the journey, the other wife, whom he did not take with him, demands from him that he should live with her for a like period (that is, for a period equal to that for which he lived with the wife who accompanied him in his journey): she is not entitled to make that demand. And Shafei, on whom be peace, says, if the husband goes upon a journey without casting lots, then the period of the journey with one wife shall be counted in favor of the other wife, and the husband shall live with the other wife for a like period.

1656. (756.) And if a man has a single wife, and the husband continues (all along) during the night, saying his (*Tuhujjood*) prayers, and keeps fasting the whole day, or spends his time in the company of his female slaves, and the woman has recourse to the Kazee: the Kazee shall order that the husband shall live for some nights with her, and shall give up some of his fasting for her sake. And Aboo Haneefa, on whom be peace, at first reserved one day and night for the wife, and allowed three days and nights for the husband (for the purposes of his fast and *Tuhujjood*

prayers); but he afterwards resiled from this view, and said that the husband shall be ordered to have regard for her, and please (and satisfy) her with his company for some days and some time, without holding that there is some fixed time for this purpose.

1657. (757.) And it is laid down in the Moontuka that when a man marries a woman, he having several female slaves of the kind called *Oomm-i-Wulud*, and several female slaves; and he says, "I shall remain with them (the slave-girls), and I shall come to her (the wife) when it pleases me:" he is not entitled to act in such a way, and he shall be told by the Kazee, "Thou shalt remain with her (the wife) for one day and night out of every four days and nights, and remain with whomsoever it pleaseth thee for the other three days and nights."

And if the husband has two wives, and he has besides several *Oomm-i-Wuluds* and several female slaves: he shall remain with each of his two wives one day and night, and he shall remain for two days and nights with whomsoever he likes from amongst his female slaves.

And if the husband has four wives, then he shall remain with each of them one day and night, and he shall not remain with his female slaves but for such small portions of time as resembles the stay of a passer by.

1658. (758.) And it is abominable for a man to have carnal intercourse with his wife whilst there is with them a child, who perceives things (*akl*), or a blind person, or a co-wife, or his or her female slave.

1659. (759.) A man has a wife and a female slave; the wife says, "I shall not live with your female slave," and she demands a separate room (*i.e.*, a separate house with a separate enclosure); she is not entitled to say so (or ask for a separate house). God knows best!

Section III.

ON MAINTENANCE DURING *IDDUT*.

1660. (760.) A woman who is observing her *Iddut* on account of divorce is entitled to maintenance and residence, whether the divorce is reversible or complete (*bain*), whether there has been one divorce or (two or) three divorces, whether the woman is pregnant or not.

And Shafei, on whom be peace, says, that a woman who has been completely divorced (whether by one, two or three divorces), is not entitled to maintenance but is entitled to residence, except when she is

pregnant (at the time of the divorce) in which case she shall (also) be entitled to maintenance. But, according to us (the Hanifites), the woman (completely separated as aforesaid), is entitled to maintenance in every case (whether pregnant or not).

1661. (761.) And a woman, who has been made separate (*bain*) by *Khoola*, or *Eela*, or *Lyan*, or by reason of her husband becoming an apostate from Islam, or by reason of the husband having had intercourse with the wife's mother, has equal right to have maintenance (*i.e.*, all such women are equally entitled to maintenance; or, in other words, each of them is entitled to maintenance, whichever out of the causes specified above might be the cause of separation in the particular case, and that the maintenance of a woman separated from one cause, is the same as that of a woman separated from another cause).

1662. (762.) And the principle which regulates the right of maintenance is that, when the separation arises from an act proceeding from the husband, which act he is at liberty to do (*Moobah*), or which act it is (even) unlawful (*Muhzoor*) for him to do, then the woman shall be entitled to maintenance and residence (the example of a *Moobah* act is divorce or *Khoola*: that of a *Muhzoor* act is the husband becoming apostate from Islam, or having sexual intercourse with the wife's mother; and she is entitled to maintenance, whatever might be the nature of the husband's act, because the separation takes place without her fault).

1663. (763.) And so also if the husband admits (or says) that the marriage of his wife was invalid, and the woman falsifies him, and the Kazee effects a separation between them after carnal intercourse; then in this case she shall be entitled to maintenance and residence: (in case of an invalid marriage, the result of intercourse is, that only *Iddut* is obligatory on the wife, and maintenance is not obligatory on the husband; but that rule is when the invalidity is clearly proved; but in the present case, the wife denies the invalidity of the marriage, and there is no *byyuna*, and consequently the Kazee cannot form an opinion on the question whether the marriage is invalid or not, and therefore the point is doubtful: and you cannot prefer the statement of either party, and therefore, the case must be treated from both points of view; therefore, admitting the husband's case, the marriage is treated as invalid, and the parties are separated; and admitting the wife's case that there is no invalidity, she gets maintenance and residence for the period of her *Iddut*: no party can be put on oath, because in

questions of marriage, the husband and the wife are not to be put on their oath, according to Aboo Haneefa: and the husband's view that the marriage was invalid is accepted, because in matters relating to the person of a woman Aboo Haneefa says, great caution is necessary).

1664. (764.) And if the separation takes place by an act proceeding from the woman; then, if such separation takes place by an act of hers, which it is lawful for her to do, such, for instance, as option of puberty and option of freedom, and absence of Koofooship or equality, she shall be entitled to maintenance and residence; but if the separation takes place by an act of hers, which it is not lawful for her to do, such, for instance, as becoming an apostate from Islam, or having connexion with the husband's son, then she shall not be entitled to maintenance; but she shall be entitled to residence (maintenance being the right of the woman, she can forfeit it; but residence is the right of God, and, therefore, cannot be forfeited by her).

1665. (765.) And if the wife obtains *Khoola* from her husband in consideration of property, and no mention has been made regarding the maintenance of the *Iddut*, she shall be entitled to maintenance; but if she obtains *Khoola* on consideration of foregoing her right of maintenance (*i.e.*, only the right to get edibles) during the *Iddut*, then her right to maintenance shall cease; and if she obtains *Khoola*, on consideration of foregoing the right of maintenance during the *Iddut* and foregoing the right of residence (during the *Iddut*), then the right of maintenance during the *Iddut* shall cease, but she shall be entitled to residence (the right of residence not being a right which admits of being given up, in any case, for reasons already stated more than once). And if she obtains *Khoola* on consideration of her releasing the husband from the obligation to pay hire for residence (in the house in which she is to spend her *Iddut*), saying, "I shall rent a house and observe my *Iddut* in that house," she shall be bound to hire a house and observe her *Iddut* in that house (and the husband shall be released from the liability to pay hire, she having accepted such liability on herself; because residence being the right of God, she is bound to hire a house, and she thus having a residence, the right of God is satisfied; who must pay the rent is a mere worldly consideration, and the contract between the parties must govern it).

1666. (766.) And if a woman has been divorced whilst she is in a house which has been on hire, the husband shall be liable for the rent of

[illegible] as long as she is observing her *Iddut* (and she must observe the *Iddut* of divorce at the very place where the divorce was caused).

1667. (767.) And if after obtaining *Khoola* the wife releases her husband from the obligation of maintenance during *Iddut*, the release shall not be valid (as being without consideration).

1668. (768.) When a man's married wife is the female slave of another, and her master has given her a room in his own house (in which she is to live with her husband), and she is divorced by her husband (by a reversible divorce, so that the woman does not become completely separated from him), and then she is emancipated by her master, and she then (*before* the expiry of her *Iddut* and before the reversible divorce comes to be perfected, so as to effect a complete separation, and *whilst* the husband is at full liberty to revoke the divorce) exercises her option of freedom (and declares herself free of the marriage and dissolves that marriage) she shall be entitled to the maintenance (for the period of her *Iddut*; here, although the separation proceeds from the woman's act, still she is entitled to maintenance for her *Iddut*, because the cause of a slave-girl's maintenance, when she resides in her master's house, is *Tubweea*, or getting a room in her master's house to live in with her husband; this *Tubweea*, being tantamount to *Ihtibas*, or detention by the husband; and the act which brought about the separation was an act which she was competent to do. See paragraph 764.) But if her master (in the same case) expels her from (or deprives her of) the particular room (which he had assigned to her and her husband in his house, and keeps her for his own household work) then her right to maintenance shall cease (because her right to maintenance, whether as a wife, or during the period of her *Iddut*, is the result of *Tubweea* and *Ihtibas*, and the former has ceased to exist, and there is no *Ihtibas* or detention by the husband); and if her master (after having deprived her as aforesaid of her particular room) gives back to her the (old) room, then her right to maintenance shall revive.

But if her master had omitted to give her a room in his own house (where she might spend her time with her husband, without interruption from her master's work) during the continuance of the marriage, and he now gives her a room in his house, after the divorce, she is not entitled to maintenance (because during the continuance of the marriage, the master did not assign her a room, but kept her in his service as usual, and therefore the husband was not bound to maintain her during the marriage; then, if after divorce the master assigns to her a separate room, the cir-

cumstance, coming into existence after the marriage has practically ceased, will not give her a right of maintenance, because the master's intention might be to get himself benefited by the maintenance).

1669. (769.) And if a man divorces his wife, and (consequently) maintenance (for her *Iddut*) becomes obligatory on him, and the woman becomes an apostate from Islam (during her *Iddut*)—which God should prevent!—her right to maintenance shall cease: and if she afterwards returns to Islam, (before the expiry of the period of her *Iddut*) her right to maintenance shall revive. But if she (after divorce and before expiry of the period of her *Iddut*) becomes an apostate, and goes into a Darool Hurub (and thus ceases in effect to live, going into a Darool Hurub after becoming a *Moortud*, being tantamount to civil death) and afterwards returns to the Darool Islam, having again become a Moslem (while at the Darool Hurub, or re-embraces Islam after returning to Darool Islam), her right to maintenance shall not revive.

(*Note.*—The divorce is an act of the husband and not that of the wife: therefore the latter becomes entitled to the maintenance of her *Iddut*; when she became a *Moortud*, after her right to maintenance had come into existence, she became deprived of the maintenance only during the period of her apostasy; and when her apostasy ceased, then her right, to which there is now no preventive cause, revives. But in the case, to follow in paragraph 770, the apostasy was before her right to maintenance for the period of her *Iddut* came into existence; and when her apostasy, which was an illegal act on her own behalf, caused separation, then she never became entitled to maintenance for the period of her *Iddut*—see paragraph 764).

1670. (770.) If a married woman becomes an apostate from Islam, and then again embraces Islam, she shall not be entitled to maintenance; (because her right to maintenance ceases by her forsaking Islam, which puts an end to the marriage by an illegal act of hers: she shall therefore not get the maintenance of her *Iddut*, and this right does not revive by her again returning to Islam).

1671. (771.) And if the divorced wife, who is observing her *Iddut*, has sexual intercourse with her husband's son, after divorce, her right to maintenance shall not cease (because the right accrued in consequence of an act of the husband, who divorced her, and this right is not dependent for its continuation on her good conduct).

1672. (772.) And if the husband divorces his wife whilst she is dis-

obedient (and away from her husband's house), she is competent to return to her husband's house and take her maintenance (for the period of her *Iddut*) from her husband (who would after such return be bound to maintain her, because her *Nushooz*, or disobedience has come to an end).

1673. (773.) And if the period of the wife's *Iddut* is prolonged by cessation of her menses, she shall be entitled to maintenance until she becomes an *Ayeesa* (or reaches to an old age, being fifty-five or sixty years), and her *Iddut* reckoned (as an *Ayeesa*) by months shall have expired.

1774. (774.) And if the woman denies that her *Iddut*, reckoned by reference to menses has expired, the word to be accepted shall be hers, with her oath; but if the husband establishes proof by witnesses regarding her admission that the *Iddut* had (already) expired, then her right to maintenance shall cease.

1675. (775.) And if *Iddut* has become obligatory on a woman, and she then (during the *Iddut*) claims to be pregnant, she shall be entitled to maintenance for two years from the time of the divorce (unless she is delivered before); and if the two years expire, and she is not delivered, and says, "I thought that I was pregnant, and I had no menses (from the date of divorce) up to this day," and demands maintenance (on the ground mentioned in paragraph 773), she shall be entitled to maintenance, and she shall be excused for all this (*i.e.*, for having stated that she was pregnant), because pregnancy is a thing in which mistakes might arise (putting a most charitable construction); she shall thus be entitled to maintenance, until her *Iddut*, reckoned according to menses, shall have expired, or until she becomes an *Ayeesa*, and her *Iddut*, reckoned according to months (after her change of life as an *Ayeesa*) shall have expired.

1676. (776.) If a female slave of the kind called *Oomm-i-Wulud* is emancipated, and *Iddut* (consequently) becomes obligatory on her, she shall not be entitled to maintenance (because the maintenance of the *Iddut* is the right of the wife and not of the female slave, with whom the master might live. See paragraph 665, for the causes of maintenance).

1677. (777.) And if the husband or the wife (who are infidels) accepts Islam, and leaves the Darool Hurub and goes to Darool Islam (in which case the marriage becomes cancelled, but if both accept Islam and go to Darool Islam, then the marriage subsists), and then the other afterwards (similarly embraces Islam), and goes to the Darool Islam, the woman shall not be entitled to maintenance (and no *Iddut* becomes obligatory. See

Fatawai Alumgiree Vol. II., page 711). There are four classes of women upon whom it is not obligatory to observe the *Iddut* : one class consists of women who have been divorced before sexual intercourse; the second is a *Hurubee* woman, who leaves her husband in the Darool Hurub and comes into the Darool Islam, under promise of protection; the third is where two women who are sisters, are married by one contract to the same husband, and the Kazee separates them from the husband; and the 4th is the woman in excess of the lawful number of four wives).

1678. (778.) A man becomes surety to a woman, on behalf of her husband, for her maintenance for every month for ever; the husband then divorces her: the woman shall be competent to demand (from the surety) the maintenance (of her *Iddut*), because the maintenance of *Iddut* is equivalent to the maintenance of marriage.

1679. (779.) When a woman who is observing her *Iddut* (*Motudda*), does not take steps to enforce payment of the maintenance of her *Iddut* until the *Iddut* expires, she shall not be entitled to maintenance: and so also if the Kazee has fixed maintenance for her for the period of her *Iddut*, and she does not get it so that one of the two parties dies, the right to realise the maintenance shall cease; but if one of the two parties does not die, and the *Iddut* expires, then the learned lawyers have differed in regard to the matter: Shumsh-ool Ayma Hulwai, on whom be peace, says, that the woman's right to realise maintenance (for her *Iddut*, which she has failed to realise, although the Kazee fixed the same) shall cease.

1680. (780.) And if the husband is absent, and his wife whom he had divorced and who is observing her *Iddut*, has borrowed (for the purposes of her maintenance for the period of her *Iddut*), and then, after the expiry of the *Iddut*, the absent husband returns, the debt shall not be payable by the husband, according to the second view taken by Aboo Haneefa, on whom be peace: and we have mentioned this rule whilst dealing with the maintenance for marriage (see paragraph 726), and the same rule holds in the maintenance for *Iddut*.

1681. (781.) And if a woman, who is observing her *Iddut*, is imprisoned for some obligation of hers, her right to maintenance shall cease, in the same way as if a married woman is imprisoned (her right to maintenance ceases, see paragragh 689).

1682. (782.) And the woman who is observing her *Iddut*, in the same way as she is entitled to maintenance for the period of her *Iddut*, is (also) entitled to her dress.

1683. (783.) And when a man divorces his wife after having sexual intercourse with her, she being a minor, but such that one like her is susceptible of sexual intercourse, she shall be obliged to observe *Iddut* for three months (the case supposed having excluded the hypothesis of menses), and she shall be entitled to maintenance (for her *Iddut,* because the divorce was after intercourse, but if the divorce was without intercourse, then there is no *Iddut* obligatory on her and no right to maintenance) : and Sheikh-ool Imam Aboo Bakur Mahomed, son of Fuzul, on whom be peace, says, if the minor wife is not about to attain her puberty (*Moorahik*), her *Iddut* is for the period of three months; but if she is about to atttain her puberty (at the time of the divorce), then her *Iddut* shall not expire by the expiry of (three) months, on the possibility that she might be pregnant by reason of the carnal intercourse, and, therefore, she shall be entitled to maintenance until it appears that her womb is free: and if (having commenced to observe her *Iddut,* by reference to months and not courses) she gets her menses, then she shall (commence afresh to) observe her *Iddut* in future by reference to her menses, and she shall have maintenance after her menses have appeared, until her *Iddut* expires by reference to her menses.

1684. (784.) When a woman who is observing her *Iddut,* does not confine herself to the house where she is observing her *Iddut,* but, on the other hand, she remains there for a time, and goes out for a time, she shall not be entitled to maintenance, because she is disobedient (or *Nashiza*).

1685. (785.) If a woman who is observing her *Iddut,* refuses to cook (for herself), then she is like the married wife (see paragraph 680), if she is the daughter of respectable people, or if she has a disease owing to which she is unable to cook or to bake bread, the husband is bound to provide her with cooked food, or to get a person who will cook for her and bake her bread; but if she is not the daughter of respectable people and she has no disease, then it is obligatory on the husband only to get her flour, or the like.

1686. (786.) If a woman is observing her *Iddut,* in consequence of the death of her husband, her maintenance (for her *Iddut*) shall come out of her own property.

1687. (787.) When a woman has been married by way of an invalid marriage, and after there has been sexual intercourse, the Kazee effects separation between the husband and the wife, and *Iddut* has become obligatory (in consequence of the invalid marriage having been followed by

intercourse), the woman shall not be entitled to maintenance (because invalid marriages are in effect no marriages at all).

1688. (788.) A man marries another's married wife and has intercourse with her; then if the man does not know that the woman is another's married wife, the woman is bound to observe *Iddut* (because here is sexual intercourse from doubt), but she shall not be entitled to maintenance: (because the marriage is invalid); but if the man knew that the woman was the married wife of another, the woman shall not be obliged to observe the *Iddut*.

And in case of a marriage without witnesses, when the husband has intercourse with the woman, the woman shall be obliged to observe *Iddut* in every case (that is, whether the husband knows or not that it is contrary to law to marry without witnesses).

1689. (789.) When a man enters into the house of his divorced wife, who is observing her *Iddut*, with a view to obtain information, is it allowable to him to enter the house? In this matter there are two traditions.

1690. (790.) And when a man pays *Zukat* on his property to his divorced wife, who is observing her *Iddut*, or when he gives testimony in her favor in some matter, this is not valid (because she is still in some sense his wife, and a wife cannot legally accept *Zukat*, and her husband cannot give evidence in her favor).

1691. (791.) A man divorced his wife thrice and concealed the divorce (not making anybody acquainted with the divorce), and when she has had two menses (after the divorce) he has intercourse with her (before the third menses could appear, and before her *Iddut* could expire) and she conceives, and he afterwards admits having divorced her: he shall be bound to maintain her, until she is delivered (because the divorce would have become irrevocable after three menses, and then the woman would have become a stranger, because the *Iddut* would have expired and maintenance would have ceased; and if the man had intercourse after three menses, the connexion would have been as with a stranger, and there would have been no liability to maintenance; but intercourse during the *Iddut*, is intercourse in doubt, and therefore maintenance becomes due). God knows best!

SECTION IV.

ON THE RIGHTS WHICH ARISE FROM THE MARRIAGE RELATION.

1692. (792.) The husband is entitled to prevent his wife from indulging in poetry (*i.e.*, in chanting musical songs), and he is entitled to inflict corporal chastisement on her for four things. Firstly,—When the wife gives up beautifying (or adorning) herself (*i.e.*, when she neglects her toilet), when the husband desires her to beautify herself. Secondly,—When she refuses compliance with his wishes, when he is inclined to have intercourse with her, she being pure (*Tahir*). Thirdly,—When she does not observe her prayers; and according to some traditions from Mahomed, on whom be peace, it is not competent to him to inflict corporal chastisement on her for refraining to observe her prayers: and refraining from bathing (and purifying herself) after she has become impure, and after she has had her menses, is tantamount to refraining from her prayers. And fourthly,—When the wife goes out of his house without his permission, after she has completely realised her (prompt) dower.

1693. (793.) A man has a wife who does not say her prayers, the husband is competent to divorce her, although he might not possess property from which he could completely satisfy her dower (*i.e.*, although he might not have sufficient means to satisfy her dower, both prompt and deferred).

And it is reported of Aboo Hufs, of Bookhara, that he said, that "Seeing God with the liability of the wife's dower on his shoulders is more agreeable to me, than that the husband should have sexual intercourse with a wife who does not say her prayers."

1694. (794.) A man is desirous of divorcing his wife without any fault of hers; then if he pays her dower and her maintenance for her *Iddut*, he is competent to do so, because this is "giving her up with propriety" (a text of the Koran; see paragraph 59 text of the Koran numbered 53, where it is translated, "dismiss them with kindness").

1695. (795.) And if the wife desires to go out and attend (generally) to a (Divine or religious) Meeting, where learning is discussed (*Ilm*) without the permission of her husband, she is not competent to do so: and if she has occasion (to inform herself on any particular legal doctrine), and she asks her husband, who is (also) learned in the law, and he informs her accordingly, then she is not entitled to go out of the house without his permission (because

the husband is able to satisfy her question): but if the husband is himself ignorant, but he questions (and gets the answer from) a learned man, even then, the wife is not entitled to go out of the house without his permission: but if the husband (who is himself ignorant) refrains from questioning (and getting the answer from a learned man), then she is entitled to go out of the house without his permission (to satisfy herself on the particular point of law), because the acquisition of knowledge (and information) on matters of which there is necessity, is a binding duty (*furz*) on every Moslem, male or female, and, therefore, such acquisition shall over-ride the rights of the husband.

But if the wife has no particular occasion (to inform herself on any point), but she intends to go out and attend a Meeting where learning is discussed, in order that she might obtain knowledge of the rules of prayers and purification (*Wuzoo*), then if the husband remembers (*i.e.*, knows) such rules (*i.e.*, the rules relating to prayers and purification), and instructs her in those rules, then she is not competent to go out without his permission; but if the husband does not remember such rules, then it is more proper for him that he should accord permission to her to go out; and if he does not accord such permission, then he shall not be liable to anything (that is, he shall not incur sin) and she shall not be competent (*i.e.*, at liberty) to go out of the house without his permission, until some particular occasion arises for her.

1696. (796.) A woman has a crippled father, having nobody (else) to look after him, and her husband prevents her from going out of the house to her father, and assisting him: it is open to her to disobey her husband and be submissive to her father, whether the father is a Moslem or an infidel; because it is obligatory on her to remain fixed in her submission (and offer of help) to her parents (*walid*), and, therefore, such submission shall have preference over the rights of her husband.

1697. (797.) The learned lawyers have held that it is not competent to the wife to go out of the house without the permission of her husband, except for certain causes: one (1) of which is, when she is in a house which it is feared might come down; another, (2) is when she goes out of the house towards a meeting of learning, when a particular occasion occurs to her (to inform herself of rules of practice, such as those relating to prayers, &c.), and her husband is not (sufficiently) versed in learning (or is not inclined to get for her the information from others): another (3) case is when she goes out of the house for a *Furz* pilgrimage, if she finds (for her

companion) a relative who is her *Moohurrum* (that is, unlawful to her for marriage).

1698. (798.) And it is allowable to the husband to permit his wife to go out of the house (instead of confining her within the four walls of the *Zenana*, like the pernicious *Zenana* system of India, which system is not enjoined by religion, law, or common sense: but the only restriction is that the wife must have a veil on her when she goes out) and he incurs no sin in according her such permission: another (4) case (when the wife can go out of the house without the permission of the husband, in continuation of the cases enumerated in paragraph 797) is, when she goes out of the house to see her parents and to offer condolence to them, and to call on them when they are sick (*ayadut*), and (also) to see such of her relatives as are (her *Muharim*, or are) forbidden to her.

If the wife is a midwife, and asks her husband's permission to attend to a delivery (then if her husband accords the permission, she can go out to attend the delivery).

And so also if the wife is in the habit of washing the dead (she must get her husband's permission to go out for the purpose).

And also when she is minded to attend a Meeting of the learned (she must ask her husband's permission).

And also when somebody else has a right against her and she has some right against somebody else (she must ask her husband's permission to go out).

1699. (799.) And it is not competent to the wife to give anything out of her husband's house without his permission.

1700. (800.) Nor is it lawful to the wife to observe such fast as is not obligatory on her (without her husband's permission).

1701. (801.) And there is no obligation on the wife to render service personally to her husband, such as the Kazee could enforce: such as baking bread, cooking food, and cleaning the house with a broom, and other like acts.

1702. (802.) A man has a mother who is young, who goes out for a *Wuleema* (marriage) dinner and on occasions of misfortune to others, she having no husband: it is not competent to the son to prevent her from going out, until it is established to him that she goes out with evil intent (*fusad*); and if this shall be established to him, he shall refer the matter to the Kazee; and when the Kazee shall order him to prevent her from going out, then it shall be competent to him to prevent her from going out; because the son (in that case) stands in the position of the Kazee.

1703. (803.) Some of the learned lawyers were asked the following question:—A woman has a husband who does not say his prayers, and the woman refuses (in consequence) to live with him: they answered that it is not competent to the woman to do so (that is, to refuse to live with him in consequence of his not saying his prayers); just as a man who is indebted to another, and the creditor has a great many rights of God owing from him such as *Zukat*, and pilgrimage, and *Ooshoor* (Sovereign's portion of the produce of land), and he (the creditor) does not discharge the obligation imposed on him by the *Shera* (law): it is not competent to the debtor to refrain from discharging the debts which he himself owes to the creditor, and to say that the creditor does not discharge the obligations of the *Shera*, and therefore, he shall not pay his debts, which the creditor has a right to receive.

1704. (804.) A wicked (*fasik*)) man invites wicked men: it is competent to his wife to bake bread and cook food, but she shall, when baking the bread and cooking the food, form an intention that as long as they shall occupy themselves in eating, they shall refrain from drinking wine, just as when a man sits in the company of wicked persons with the intention (formed in his mind) that they shall refrain from their wickedness for the period he shall be sitting with them, it is allowable to him to sit with them, and he shall be rewarded for this. God knows best!

SECTION V.

REGARDING A WOMAN WHO DOES NOT KNOW WHETHER SHE IS STILL A MARRIED WIFE OR HAS BEEN DIVORCED.

1705. (805.) Two witnesses give evidence (before the Kazee) against a man (whether a claim has been made or not), that he has divorced his wife thrice; the woman either claims the divorce or denies it, or says she knows nothing about it: the evidence of the witnesses shall be accepted; because the evidence relates to a right of God, and it is not a condition (for the evidence to be accepted, and for action to be taken in a matter which relates to the right of God), that a claim should have been made. (By right of God is meant a public right, as contradistinguished from particular individual right. See Nuwal Kishore's Edition of the Towzeeh, Tulweeh, and the Chulupee, p. 462, where this matter is fully discussed in the Chulupee. See also Rudd-ool Moohtar, Vol. IV, in the Book on Evi-

dence, p. 574, and Humuwee, on Ashbah-wo-al-Nazair, p. 386, where it is laid down, that in the following matters, evidence is receivable without a claim :—I, Divorce. II, Emancipation of the slave-girl, and not of the male slave, because the *Hoormut*, or the unlawfulness of the *Furj*, or the person of the woman, is the right of God. III, *Wukf*. IV, The appearance of the Moon of *Ramzan*, and other months, but not of the Moon of the *Fitr* and the *Qurbanee*. V, Punishments, or *Hoodood*, except the *Hudd* of *Quzuf* and *Hudd* of theft. VI, *Nusub*, though as to this there is a difference of opinion. VII, When a slave-girl has been made a *Moodubbura*. VIII, *Hoormut-i-Moosahrut*. IX, *Khoola*. X, *Eela*. XI, *Zihar*. XII, Emancipation of a slave, according to Mahomed and Yusoof. XIII, State of *Hooreeut-i-Asl*, or the natural freedom of a woman, though as to this there is some difference. XIV, *Nikah*.)

Then if the Kazee knows that the witnesses are upright, he shall effect a separation between the woman and her husband, and shall (if there has been sexual intercourse) make an order in her favor for her maintenance during the period of her *Iddut*, and (also) for her residence (during such period); because a woman who has been completely divorced (*Mubtootuta*) is *entitled to maintenance during her Iddut (provided the husband has* had intercourse with her; for otherwise she is not bound to observe the *Iddut*, and, therefore, not entitled to maintenance or residence for the period of the *Iddut*).

But if the Kazee does not know that the witnesses are upright, then he shall make an enquiry regarding their character, and (pending the enquiry) he shall prevent the husband from retiring with his wife and from approaching her, whether the husband be upright or wicked (*fasik*), but the Kazee shall not order the woman to go out of her husband's house, because the woman is either still a married wife (*i.e.*, in the event of the witnesses being false) or she is in the observance of her *Iddut*, after divorce (if the witnesses are just and upright); but the Kazee shall direct that another just woman shall remain with her, in order that the latter might prevent the husband from approaching his wife: and if the wife asks (from the Kazee) for her maintenance for the period pending the enquiry regarding (the character of) the witnesses, then the Kazee shall fix for her such maintenance as is fixed for *Iddut*, whether the wife claims a divorce or not; because, (one point of view of the matter is this that) although she might not (in reality) have been divorced, still the husband has been prevented from having access to her (although she might still be his wife), and (there being no *Ihtibas*, or

detention by the husband) she would be (ordinarily) deprived of her (right to) maintenance; whereas (that is the other point from which the matter may be viewed that is that), if she has in reality been divorced, she is entitled to maintenance (for the period of her *Iddut*); therefore (the question whether the woman is entitled to maintenance or not, being one of a doubtful nature) she shall be entitled to maintenance (because maintenance cannot cease on account of a doubt).

Then if the Kazee takes a long time to make his enquiry regarding the (character of the) witnesses, so that what would (ordinarily) be sufficient to fulfil (or complete) her *Iddut* takes place (such, for instance, as delivery, or the expiry of three menses), she shall not be allowed maintenance after this (*i.e.*, after the expiry of her *Iddut*); because, if she is still a married wife, the husband has been prevented from having access to her (and, therefore, the husband is not bound to maintain her), and if she has in reality been divorced, then her *Iddut* has expired, and, therefore, we derive certainty that her right to maintenance has ceased (contrary to the case first supposed, where the *Iddut* had not expired: and where the period of *Iddut* does not expire, there the woman is entitled to maintenance for the period of her *Iddut*; therefore the non-expiry of *Iddut* should, in the first case, result in the maintenance being allowed in her favor; but the absence of detention by the husband should in the same case result in the absence of right to maintenance; this was the doubt in the first case. But in the present case, the expiry of her *Iddut* requires that there should be no maintenance, and the absence of detention by the husband also requires that there should be no maintenance; therefore absence of a right to maintenance is a matter of certainty in the present case).

Then if the result of the Kazee's enquiry leads him to the conclusion that the witnesses are just, the Kazee shall order divorce, and whatever has been taken by her (on account of maintenance) shall be (declared to have been properly) appropriated by her (that is, the same shall not be taken back from her).

But if (the result of the enquiry is that) the witnesses are rejected, then the Kazee shall withdraw his interruption (in the relationship) between the husband and the wife (and shall remove the strange woman left in the house to keep watch, as aforesaid), and (in this case), the woman shall give back to her husband what she has taken on account of her maintenance, because it is clear in this case, that she has taken maintenance whilst she was in the same position as a disobedient wife (who could not be approached by her husband).

1706. (806.) And in the same way, if the Kazee has decreed a divorce, and it appears afterwards that the witnesses (who had proved the divorce) were slaves, the woman shall return to her husband what she has taken on account of maintenance (for the period of her *Iddut*).

1707. (807.) And so also, if a man marries a woman, and the latter makes a claim (before the Kazee) in regard to her maintenance, and the Kazee fixes her maintenance, and the woman receives her maintenance for several months, and then witnesses prove that she was the husband's foster sister, and the Kazee (consequently) makes a decree for separation between them, then the husband shall be entitled to get back from her what she has received on account of maintenance (as a duly-married wife); because it now transpires that what she received (on account of maintenance) was without any right; this right of the husband to get back (the maintenance), arises when the Kazee has fixed the maintenance (for her), but if the husband has, out of his liberality, himself (without being compelled by the Kazee to do so), given her maintenance, the husband is not entitled to get back anything from the woman.

1708. (808.) And if witnesses give evidence as regards a slave-girl in the possession of a man, that she is a free woman, the evidence shall be received for the reason stated (in paragraph 705), in regard to divorce (*viz.*, that the evidence relates to a right of God, and, therefore, the matter should be enquired into even without anybody appearing as a claimant): and if the Kazee does not know that the witnesses are just, he shall make an enquiry as regards their character, and he shall fix for the woman maintenance for the period during which he shall make the enquiry regarding the character of the witnesses, and he shall compel the man to provide her with maintenance (pending such enquiry), and shall (pending such enquiry), keep her in the custody of a just woman.

And in the case of a divorce, we have laid down that the Kazee shall not remove the woman (*i.e.*, the wife) out of the house of the husband, because she was either still the married wife of the husband, or she was divorced by him (and a divorced wife must spend the period of her *Iddut* in the house where her husband divorced her), and therefore her removal from the house of the husband would not be valid: but in the present case, if the woman is a free woman, her removal from the house of her master is valid (but if she is not a free woman, but is a slave, then it is not valid to remove her from the house; therefore, on one supposition, she can be validly removed in this case; whereas in the case of divorce, both the suppositions resulted in

the conclusion that the woman could not be removed from the house of her husband): therefore the Kazee shall remove her from the house of her master, and shall keep her in the custody of a just woman. The remuneration of the woman who is to be the trustee, shall come out of the *Bytool Mal* (or Public Treasury); because she is acting in the cause of God: and the Kazee shall order the defendant (against whom the evidence is given that he is keeping the free woman as a slave) to provide for the maintenance of the woman (as to whom the question is raised, whether she is free or not), although the period during which the Kazee's enquiry into the character of the witnesses might be prolonged; contrary to the case (in paragraph 805) in which the question of divorce is involved; because in the latter case, when an event transpires which puts an end to the *Iddut* (*e.g.*, delivery, or the like) the right to maintenance ceases: but in this case (in which the question regarding the freedom of the woman is concerned) until the Kazee decides that the woman is free, the right to maintenance (as against the master) shall not cease: and the Kazee shall enforce maintenance (for the period of enquiry as aforesaid) because a human being has the capacity to take legal proceedings (and take steps to enforce his rights) and therefore compulsion can be used to enforce his right; contrary to the case of those that are not human beings but are animals; because the maintenance of animals is binding on the conscience of the owner (and they are morally, or *Dyanutun*, bound to provide food for animals, and dereliction of duty towards animals is sinful and punishable by God, and not by man), and compulsion cannot be exercised in that matter, because animals have not the capacity to take legal proceedings.

Then, if the defendant gives maintenance to her (pending such enquiry as aforesaid) and afterwards it appears to the Kazee that the witnesses are just persons, and he decrees that the woman is a free woman, the defendant (*i.e.*, the master) shall be entitled to get back from the woman what she has taken on account of maintenance, whether she claims to have been always a free woman or claims freedom in consequence of emancipation by her master (the defendant), or does not claim freedom; because it is (now that the witnesses have appeared to be just, and the Kazee has decreed the woman to be free) clear that she received the maintenance (aforesaid) without any right: and so also if the woman eats of anything belonging to the master without the order of the master (*i.e.*, the master shall be entitled to recover from her what she has consumed of his property pending the enquiry).

And if the witnesses are rejected by the Kazee (as the result of his enquiry into their character), the female slave shall (also) be returned to the master (from the custody of the trustee), but the master shall not get back anything from her (which she might have received by way of maintenance as aforesaid); because in this case he has been maintaining his own slave, and he shall also not get back from her anything which she has taken (or might have taken) from his property without his permission, because the master cannot make his slaves liable for damages with regard to property.

And so also if a man has a female slave who complains to the Kazee that he does not maintain her: the Kazee shall order the master either to maintain the slave-girl or to sell her; but if the Kazee compels him to maintain her, and he gives her maintenance, and then proof by witnesses is established that the woman has always been a free woman, and the Kazee makes a decree that she is a free woman, the master shall get back from the woman that maintenance (which was so fixed by the Kazee), and whatever she has taken out of his property without his permission; but he shall not be entitled to get back from her what she has eaten with his permission.

1709. (809.) A man claims that a female slave in the possession of another belongs to him; the defendant denies the claim; the plaintiff establishes proof by witnesses (*byyuna*) in support of his claim: the Kazee shall keep the woman with a just person (*i.e.*, a woman), as long as he is enquiring into the character of the witnesses, and he shall order the defendant to give her maintenance, by reason of (the obligation he is under arising out of) his apparent ownership. Then, if he (the defendant) maintains her, and the evidence (or *byyuna*) comes to be rejected, the female slave shall continue to be the property of the defendant, and nothing shall be recoverable from her (by the defendant on account of the maintenance); because it becomes clear (as the result of the breaking down of the *byyuna*), that he maintained his own slave (by maintaining her by the order of the Kazee): but if the witnesses appear to be just, and the Kazee (consequently) makes a decree in favor of the plaintiff, the defendant shall not recover (from anybody) what he has laid out on account of maintenance (of the slave-girl); because it appeared (now that the *byyuna* is accepted) that the female slave was obtained by usurpation (*Ghusub*), and she ate of the property of the usurper (in availing herself of the maintenance order made by the Kazee), and the offence (or *Junaaut*) which the usurped

slave is guilty of, shall be compensated for by the usurper (and if she had eaten out of another man's property, then the usurper would have to pay damages to that man, therefore when she has eaten of his own property, he must pay damages to himself): this is according to the view of Aboo Haneefa on whom be peace (who holds that the defendant shall not recover); but according to the view of Aboo Yusoof and Mahomed, on whom be peace, this (*viz.*, what was spent on account of maintenance), is a debt recoverable from the female slave, who shall be sold for the same, or her master (the plaintiff) shall pay damages on her behalf; and if she is sold, or if the master (the plaintiff) pays damages on her behalf, then (the plaintiff) the master shall recover from the defendant the lesser of the two amounts, *viz.*, the amount of her price and the amount spent on her for maintenance.

And if the slave claimed is a male slave, then if he is a minor, or if he is sick, so that he is not capable of earning (his own livelihood), then he shall be considered as if he were a female slave, and the defendant shall (pending the enquiry into the character of the witnesses) be ordered to maintain him, as in the case of the female slave, but the male slave shall not be taken away from the defendant (as the female slave has been directed to be taken away and kept with a trustee); but on the other hand he shall be kept in the hands of the defendant, who shall have to give surety for the thing claimed (*i.e.*, the slave in dispute); unless the defendant is a man as regards whom there is a fear and an apprehension that he may make away with the slave, in which case the slave shall be taken away from the defendant.

And if the slave is an adult and is capable of earning (his own livelihood) he shall be left in the hands of the defendant in the way we have stated (in regard to a minor or a sick slave), and the defendant shall not be compelled to maintain him; on the other hand, the slave shall be ordered to earn his (own) livelihood, and to maintain himself out of his earnings.

And if the female slave is capable of earning, such as by cooking (*i.e.*, by baking) bread or by sewing, or the like, then she is in the same position as a male slave (pending the enquiry into the charater of the witnesses), and she must maintain herself, (and the defendant shall not be ordered to maintain her).

1710. (810.) If a man captures a runaway slave (belonging to some one unknown) and refers the matter to the Kazee: the Kazee shall order the man in whose hands the slave is (that is, who has captured the slave) to provide the slave with maintenance, and to recover the maintenance from

the master (when the master shall have been discovered), and the slave shall not be ordered to earn for fear that he might again run away. God knows best!

Section VI.

ON THE MAINTENANCE OF CHILDREN.

1711. (811.) The maintenance of minor children and of adult daughters, who (*i.e.*, the latter) are poor, is due from the father, and nobody else shall share the liability with him: and the father's liability shall not cease by reason of his poverty.

1712. (812.) And it is not obligatory on the father to maintain his adult male child, unless such child is incapable of earning by reason of his being a cripple, or by reason of his being sick, and then (when he is a cripple or sick) his maintenance is due from his father. And the male adult child, who is capable of doing a thing, but does not do it properly, is in the same position as one who is incapable of doing it, because one who does not do his work properly, is not (generally) employed by people (to work).

1713. (813.) Sheikh-ool Imam Shumsh-ool Ayma Hulwai, on whom be peace, has said, "Verily, if a man is in health, but is unable to earn on account of his being an idiot (*Khurf*), or on account of his being in the habit of remaining in-doors (and passing his life in the *Zenana*, having learnt no art)—such being the case—his maintenance is due from his father, although he might have strength of action;" and he has said that the learned lawyers have held the same view as regards one who is a student, who he does not know any art or profession (*Kusub*), and his maintenance shall not cease to be defrayed by his father, and he shall be considered as a cripple, or in the light of a female.

1714. (814.) And if a minor child is sucking, and if its mother is still in the marriage of its father, and the minor sucks (and does not repel) the breast of (a stranger, *i.e.*, a woman) other than its mother, then the mother shall not be compelled to suckle the child (if the father has means to get a wet-nurse); but if the child does not take to the breast of another woman, then Shumsh-ool Ayma Hulwai, on whom be peace, says that, according to the Zahir-i-Rawayet, the mother shall not likewise be compelled to suckle the child, but that, according to Aboo Haneefa and Aboo Yusoof, on whom be peace, she shall be compelled to suckle the

infant; and Shumsh-ool Ayma Surukhsy, on whom be peace, says, that the mother shall be compelled to suckle the child (when the child does not take to the breast of another woman), and he does not state that there is any difference in this matter (such as Shumsh-ool Ayma Hulwai states): and the Futwa is given according to what is stated by Shumsh-ool Ayma Surukhsy.

1715. (815.) But if the father or the infant has no property (or means to get the services of a wet-nurse), then the mother shall be compelled to suckle the child, according to all (*i.e.*, Aboo Haneefa, Yusoof, and Mahomed).

1716. (816.) And if the infant's father engages its mother on hire to suckle the child, and the mother is still the wife of the father, the mother shall not be entitled to the hire (to suckle her own child), according to them (*i.e.*, Aboo Haneefa, Yusoof and Mahomed); but if the father engages his wife to suckle a child, who is not her child, she shall be entitled to the hire.

1717. (817.) But if the father of the infant has divorced the mother of the infant, and the *Iddut* has expired, and the father afterwards engages the mother of the child to suckle the child, his engaging her on hire is valid, and the mother shall be preferred to a stranger (in regard to the engagement of services for suckling the infant).

1718. (818.) And if the mother is in her *Iddut* in consequence of a complete (*bain*) divorce, or in consequence of three divorces, and (during such *Iddut*) the father of the child engages the mother of the child on hire to suckle her, then, in this matter, there are two traditions (from Aboo Haneefa); in the tradition (from him) as mentioned in the Asul (a work of Mahomed), she shall be entitled to the hire; and in the tradition from him, as reported in the (Chapter on) Hire (by Mahomed), she shall not be entitled to the hire.

And if the mother refuses to suckle the infant (*i.e.*, her own child), after the expiry of the *Iddut*, it shall be obligatory on the father of the child to engage another woman (or nurse) on hire to suckle the child near the mother, and the child shall not be removed from the mother. And if the mother says, "I will suckle the child for the hire which the wet-nurse shall charge," then the mother shall be preferred; but if she demands a larger hire she shall not be entitled to the increase.

And after the child has been weaned, the Kazee shall fix the mainte-

nance of the child according to the means of the father, and the maintenance shall be made over to the mother, so that she might therewith maintain the child; because the mother is the proper person to know what is the best food for the child to take; but if the mother is not to be relied on (*Sika*), the maintenance shall be made over to another, in order that that other might maintain the child.

1719. (819.) A woman is divorced by her husband, she having minor children; the woman then makes an admission that she has realised their maintenance (from their father) for five months; then she says, after this admission, "I have got twenty dirhems, whereas the maintenance for like children during that period (*i.e.*, the five months) is one hundred dirhems:" it is said in the Moontuka, that the admission related to the maintenance for like children (for five months), and she shall not be believed in regard to her statement that she had got (only) twenty dirhems.

And if she says, after having made an admission that she had realised the maintenance, that she has lost the maintenance, then she shall recover from the father of the children the maintenance which like children should get (for the remainder of the period of five months).

1720. (820.) A woman obtains *Khoola* from her husband, on condition that "she releases him from her own maintenance and from the maintenance of her children, whether the children are suckling infants or not, and from the maintenance of the child in her womb:" it is said (by Aboo Haneefa) that (this condition is void, but) she is bound to return to the husband the dower which she might have received from the husband (and the *Khoola* shall be considered as being in consideration of the dower which she now returns), and she herself shall not be liable for the maintenance of the child (*i.e.*, the children, who shall be maintained by their father), and she shall be entitled to receive her maintenance during the period of her *Iddut*.

(*Note.*—The *Khoola*, in this case shall be held good in consideration of the dower; so that if she has received any portion of the dower, she shall have to return that portion; and if she has received no portion of the dower, her right to the dower shall be extinguished: this is the rule when the condition stipulated for by the woman runs thus, "I have accepted *Khoola*, in consideration of the maintenance of my child, and in consideration of my maintenance," where the period of the child's maintenance is left in doubt, although the period of the woman's maintenance is not left in doubt,

because her maintenance means her maintenance during her *Iddut*. When, therefore, the period of the child's maintenance is not stipulated for, the consideration is uncertain, and, therefore, the *Khoola*, shall be good for the woman's dower. See paragraphs **1714**, **1722**, **1723**, **1724**, **1775**, **1776** and **1779**. See also Rudd-ool Moohtar, Vol. II., pp. 931 to 933).

1721. (821.) A woman claims (before the Kazee) against her husband that he does not maintain her infant child: the learned lawyers have said that if the Kazee has (already) fixed the maintenance of the child against the husband, or if the husband has himself fixed it upon himself, and if the woman lays claim for the maintenance after the expiry of some time (from the time the Kazee or the husband fixed the maintenance as aforesaid), and if the husband denies the claim, the husband shall be put on his oath; if not, then not. (That is to say, if the maintenance was not fixed, either by the Kazee or by the husband himself, then the husband shall not be put on his oath, because there is no case against him: the case relates to past maintenance, which has not been ascertained in any way, and, therefore, the case shall be simply dismissed).

1722. (822.) A man in indigent circumstances has a minor child (who is also poor); then if the man is able to earn (his livelihood), it is obligatory on him to earn and maintain his child; but if he is not able to earn, the Kazee shall fix against him the maintenance (of the child) and he shall order the mother to borrow, as against her husband, and then to recover the amount from the father when he shall become rich (and affluent).

And so also, if the father is able to maintain the child, but refrains from maintaining the child, the Kazee shall fix maintenance against him, and the mother shall then realise the maintenance from him.

And so also, if the Kazee has fixed the maintenance of the child against the father, and the father then leaves the child without maintenance, and the mother then borrows and maintains the child by the order of the Kazee, she shall be entitled to realise the amount borrowed by her from the father.

1723. (823.) And the father shall be imprisoned for the maintenance of his child, although he is not liable to imprisonment for other debts of his child (that is to say, for other debts contracted on behalf of or for the child).

1724. (824.) And if the Kazee has fixed the maintenance (of the child),

against the father (and the father fails to provide for maintenance), the mother omits to borrow (to maintain the child), and the child (that is, maintains himself), by begging from people: the mother shall be entitled to get back anything (on account of maintenance which father ought to have paid under the decree of the Kazee, but which has failed to pay); and if the child by begging can get only a moiety of what would be sufficient to maintain him, then a moiety of the maintenance (fixed by the Kazee) shall cease to be payable by the father, the mother shall be entitled to borrow to the extent of the remaining moiety.

1725. (825.) And so, if maintenance has been fixed (by the Kazee) against a man in respect of some *Maharim* (i.e., persons who would be unlawful to the man, if one of the two parties supposed to be a man and the other a woman), and they are obliged to maintain themselves by having to beg from people, they shall not recover anything on account of maintenance from the man on whom the maintenance was fixed, but when the wife is the person for whom the maintenance has been fixed; and she maintains herself out of her own property or by begging from people, then she shall be entitled (notwithstanding that she has so maintained herself) to recover the fixed maintenance from her husband.

1726. (826.) A man absents himself without leaving maintenance for his minor children, who have no property with them: the mother shall be bound to maintain them, but she shall be entitled afterwards to recover the amount from the father.

1727. (827.) A minor attains age so as to be able to earn his livelihood, but he has not attained the state of manhood, the father is entitled to entrust him with business, or to let him out on hire for some business or service, and maintain him in that way (*i.e.*, maintain the boy from the boy's own earnings); and if the child is a daughter, then the father is not entitled to send her for service to a man who is not (her *Maharrum, i.e.*, who is) unlawful to her, because meeting with (or encountering) a stranger is unlawful. And if some surplus remains out of the earnings of the child after (what has been spent for his) maintenance, the father shall preserve the amount until the minor attains majority (and he shall not himself appropriate the same).

But if the father is a spendthrift, and there is fear to the property from him, (*i.e.*, there is fear of the property being wasted by him) then the Kazee shall take the surplus earnings from him, and shall keep the same

becaue hands of a just person, in order that he might take care of the therce until the minor shall have attained majority.

cons **1728.** (828.) And so also, as regards every property of the minor what is, the father shall preserve it; and if the father is a spendthrift, the Kazee shall take the property out of the hands of the father and entrust the same to a just person).

1729. (829.) If a minor has a mother, who is completely separated (*bain*) from her husband, and who is in want for her maintenance (and the *Iddut* has expired), it is allowable for her to maintain herself from the earnings of her child, whether the child be a minor or an adult (that is, the father cannot bring the minor child's property to his own use, but the mother may).

1730. (830.) And the maintenance of the adult daughter, according to the Zahir-i-Rawayet, shall be upon the father particularly (*i.e.*, shall be only on the father and not on the mother), and so, a son, who attains majority, whilst he is blind or whilst he is a cripple, or whilst he is sick (*Illut*), so that he is not able to earn his own livelihood, if that son is in want of maintenance, must have his maintenance from his father particularly.

1731. (831.) And Khussaf, on whom be peace, says, that the maintenance of the daughter who has attained her puberty, and of the adult son who is a cripple and of the adult son who is unable to earn his own livelihood himself, is on the parents, in proportion of two-thirds on the father and one-third on the mother.

And in the Zahir-i-Rawayet it is stated that the adult daughter and the adult son who is a cripple, are in the position of minors, and their maintenance shall be provided for by the father particularly.

1732. (832.) And the father's father, in the absence of the father, is in the position of the father in regard to maintenance (of the grandchildren).

1733. (833.) A man who is a cripple, or who is afflicted with a disease so that he is unable to follow a calling (*Hirfa*): and he has a daughter who is of age, but who is (likewise) indigent (*fakeer*), he shall not be compelled to maintain her, but he shall be compelled to maintain his minor child; and if the minor child has property which is absent (*Ghaib*), the father shall be ordered to maintain the minor, and he shall then realise the amount (of maintenance) from his child's property.

And if the father has provided maintenance (for the child) without the order of the Kazee, he shall not be entitled to realise the amount (from

the property of the minor), unless he had an intention, at the time he maintained the child, that he would realise the amount from the child's property; and in this case he shall be entitled to realise the amount (himself from the child's property) in (without compunction of) conscience (but he can not have recourse to the Kazee for the realization of the same); but if the father, at the time of maintaining the child (without the Kazee's order), calls upon witnesses to bear testimony (of his intention) to realise hereafter the amount from the property of the minor, then he shall be entitled to realise the amount (in conscience and also by having recourse to the Kazee).

1734. (834.) A minor has a father who is poor, but a grandfather (that is) father's father, who is rich; and the minor has property which is absent (*Ghaib*): the grandfather shall be ordered to maintain the minor, and the maintenance shall be a debt in favor of the grandfather, payable by the father, and the father shall realise the amount from the property of the minor; but if the minor has no property, then this shall be a debt in favor of the grandfather, payable by the father.

1735. (835.) And if the father is a cripple, and his minor child has no property, the grandfather shall be ordered to maintain the minor, and the grandfather shall not recover the amount from anybody.

1736. (836.) And so, if the minor's mother is rich, or the minor's grandmother (mother's mother or father's mother) is rich, and the minor's father is poor: the mother or the grandmother shall be ordered to provide the minor with maintenance, and the amount shall be a debt payable by the father, if the father is not a cripple, but if he is a cripple, then he is not liable for anything.

1737. (837.) And an infidel (or *Kafir*) shall be compelled to maintain his children who are Moslems.

And so shall the Moslem be compelled to maintain his infidel child who is a cripple.

And the father shall not be compelled to maintain his child who is a slave (*e.g.*, when a man marries a slave-girl belonging to another, then the progeny shall be the master's property).

1738. (838.) Two men have a female slave in common between them; she gives birth to a child and both of them claim the child: then the maintenance of the child shall be provided for by both (and both shall be considered as the father of the child).

SECTION VII.

ON THE MAINTENANCE OF THE PARENTS AND OF THE *ZAWIL ARHAM.*

1739. (839.) A son who is rich, shall be compelled to maintain his parents who are poor, and a son who is poor is not bound to maintain his father who is poor, according to the Shera (*i.e.*, the Kazee shall make no order against the son), if the father is able to follow some occupation (*umul*). But if the father is a cripple, or if he is not able to follow some occupation, and the son (who is poor) has a family (*Ayal*), the son is bound to join the father with his family and maintain all of them.

1740. (840.) And the definition of a rich person in the matter of maintenance is (this, that a rich person is) one who is the owner of surplus property, after maintaining his family, the surplus being such an amount that *Zukat* becomes obligatory on the surplus.

1741. (841.) Then if a poor man has two sons, one of them surpasses (his brother) in wealth, and the other is the owner of wealth to the extent of one *nisab* (a measure which renders *Zukat* obligatory), the father's maintenance shall be obligatory on both sons, in equal shares.

1742 (842.) And so also, if one of the two sons is a Moslem, and the other a *Zimmee* (that is, an infidel who lives in the Darool Islam, and pays a *Jezea*), the maintenance (of their father) is obligatory on both of them, in equal shares.

1743. (843.) A poor man shall not be compelled to maintain other than four (classes of persons) :—(i) His minor child. (ii) His daughters, who have attained puberty, whether virgin (*i.e.*, unmarried) or *Syeeba* (married). (iii) His wife. (iv) His slaves.

1744. (844.) And Hisham reports a tradition from Mahomed, on whom be peace, that a man has a father who is poor, and the son (that is the man himself) is an artizan (*Hirfa*), who earns one dirhem per day; and four daniks (*i.e.*, less than one dirhem) are sufficient for his maintenance and that of his family : he is bound to spend the surplus towards the maintenance of his father.

1745. (845.) And in the same way as a rich son is bound to maintain his poor father, he is also bound to maintain the servant of his father, whether that servant is the father's wife, or his female slave, when the father stands in need of the services of a person.

1746. (846.) And the father is not bound to maintain his son's wife.

1747. (847.) A poor son is an artisan, and he has a poor father who is (likewise) an artisan: the son shall not be compelled to maintain his father; and verily, have we mentioned this (see paragraph 839); but if the father is a cripple, the son shall be compelled to maintain his own wife, and his minor child, and his adult daughter, and also to maintain his father.

1748. (848.) And if the father is a cripple, then the son shall be compelled to maintain his own wife and his minor child, and shall not be compelled to maintain his adult daughter, and this is the view taken by Natify, on whom be peace; and he shall not be compelled (according to Natify) to maintain his father or mother, although the father might be a cripple.

1749. (849.) And the grandfather, that is, the father's father, in the absence of the father, is in the position of the father.

1750. (850.) But the grandfather on the side of the mother, Natify says, is in the position of a brother, and no maintenance shall be given to him (grandfather), although he might be poor, if he has healthy (*Suheeh*) limbs, and is in no way crippled. And Khussaf, on whom be peace, says, that the grandfather, on the side of the mother, if he is poor, must be maintained, although he might not be a cripple; and that he is in the position of father's father.

1751. (851.) A poor man has a brother, who is rich, and a daughter's daughter who is (also) rich: his maintenance is obligatory on the daughter's daughter and not on the brother: and so also if he has a (rich) daughter and a (rich) son's son, then his maintenance shall be obligatory on the daughter in particular. And if he has a son and a daughter (both rich) his maintenance shall be obligatory on them in equal shares: and some of the learned lawyers have said that his maintenance shall be obligatory on them (*i.e.*, the son and the daughter) in the proportion of thirds (that is, two-thirds on the son, and one-third on the daughter), according to their share in his inheritance. But the Futwa is in accordance with the first view (that is, the son and the daughter shall be equally liable to maintain him).

(*Note.*—See Futuh-ool Kadeer, Vol. II, p. 385, and Rudd-ool Moohtar, Vol. II, p. 1116. In the maintenance of the ascendants and the descendants, what is to be the guide is nearness or *Koorb*, after portion or *Jooz*; and not inheritance. Nearness after portion means this, that the first thing which

should be considered is the being a portion of a person, by reason of *Wilad*, or birth, immediately or mediately; *e.g.*, the father and the son have the relation of *Wilad* immediately, the father having procreated the son; the son is a portion of the father; after *Joozeeut*, the next thing to look at is nearness; *e.g.*, where the father is poor, and he has a rich son and a rich son's son, then the son shall maintain him: so also if a poor son has a rich father, and a rich father's father, then the former shall have to maintain him. And *Joozeeut* or *Wilad* shall be preferred to other classes of relationship, *e.g.*, see the case in paragraph 851, where the daughter's daughter is preferred to a brother: and in case of *Joozeeut*, or *Wilad*, nearness shall be preferred, as when there is a daughter, or son's son, the former is preferred: and right of inheritance shall have no regard paid to it. This rule, however, does not hold good in a few exceptional cases, as when a man is poor and he has a mother and a father's father, and a full brother—see paragraph 865 and 866—then the liability to maintenance shall be on the father's father although the mother is nearer in *Joozeeut*; and if he has a mother and a father's father—see paragraph 859,—then they shall have to provide maintenance in thirds, *i.e.*, in the proportion of $\frac{1}{3}$ for the mother and $\frac{2}{3}$rds for the grandfather. Then the Rudd-ool Moohtar says, he has found out a general rule of universal application which does not admit of exceptions, but this rule extends over several pages of closely printed, small type of Arabic. See pages 1117 to 1119 of the Rudd-ool Moohtar).

1752. (852.) A (poor) woman's husband is poor, but her brother is rich: Aboo Yusoof, on whom be peace, has said, that the brother shall be compelled to maintain her, and he shall then recover the amount from the husband.

1753. (853.) A poor woman has a place of residence in which she resides, and she has a rich brother: the learned lawyers have said that the brother shall not be compelled to maintain her: and Khussaf, on whom be peace, has said, that the brother shall be compelled to maintain her: and Shumshool Aywa Hulwai, on whom be peace, has said, that the correct view is that laid down by Khussaf. And the first view is that taken by Shooryk, who says, that if a person has a house in which he resides, or if he has a slave who serves him, or if he has an animal on which he rides, then his maintenance is not obligatory on such relatives as are called *Zee Ruhum-i-Moohurrum*; and that a distinction arises between *Zawil Arham* (on the one hand) and between parents and children (on the other hand); and he says that, in the case of the parents and children, this (that is, possession

of a house, &c.), does not prevent liability to maintenance (that is, if the man is poor but has a residence, &c., his parents or his children must maintain him). But according to us, all are equal (that is, there is no distinction between *Zawil Arham* and parents and children), and ownership of a house (or animal, or slave) does not prevent the right to be maintained (whether by the *Zawil Arham,* or by those having the relationship of *Joozeeut* and *Wilad,* such as the parents and the children) unless there is surplusage in the house, so that one portion of the house is sufficient for residence, and the rest might be sold : and so also, if the slave or the animal is of a superior quality, so that it is possible to sell the same and to purchase with the price thereof one of an inferior quality, and to apply the surplus for personal maintenance : in these cases he shall have no right of maintenance.

1754. (854.) A daughter is poor, and she has a house of residence, and she has a rich father: the father shall be compelled to maintain her unless there is surplusage in her house.

1755. (855.) And as against an absentee, his property shall not be sold on account of maintenance, unless the maintenance is for the parents; and the parents have authority to sell the furniture (*Oorooz*) of the absentee on account of their maintenance, according to Aboo Haneefa, on whom be peace: but according to his two disciples, it is not lawful for the parents to sell the furniture of the absentee on account of their maintenance, in the same way, as, according to all the three Imams, it is not valid to sell land (or *Akar,* on account of the maintenance of even the parents; for, in case of other maintenance, even furniture cannot be sold).

1756. (856.) If a woman sells the property of her absent husband on account of her maintenance, this is not valid according to them (all the three Imams).

1757. (857.) If the father applies the property of his (adult) child (*wulud*), who is absent, for his maintenance, and the son appears and claims that the father was rich at the time he applied the property for his maintenance, and the father denies this: the father's condition at the time of the proceedings (*Khoosoomut*) shall be considered (when there is no evidence on either side); and if the father is poor at the time of the proceedings (*Khoosoomut*), his word shall be accepted; if not, then not; and if both of them establish proof by witnesses in support of their claim, the proof by witnesses to be accepted shall be that adduced by the son; because such proof is adduced for the establishment of a thing which supervenes (*Ariz,*

and that is the being rich, the normal state being poverty—being the state in which one makes his entry into this world).

1758. (858.) Two *Hurubees* (*i.e.*, infidels who are residents of the Darool Hurub) enter the Darool Islam, under assurance of safety (*Aman*), and they (being husband and wife) have a Moslem son (*i.e.*, the son has been residing in the Darool Islam before the advent of the parents): their maintenance shall not be obligatory on their child: but a Moslem is bound to maintain his *Zimmee* parents (that is, if two infidels, being man and wife, reside in the Darool Islam, and then the son accepts Islam, the son is bound to maintain them). And so also the maintenance of a Moslem child is obligatory on the infidel father (who lives in the Darool Islam).

1759. (859.) A (poor) minor, whose father is dead, has a mother and a grandfather, that is, father's father: the maintenance of the minor shall be obligatory on them, according to thirds; that is, one-third on the mother, and two-thirds on the grandfather.

1760. (860.) A minor has a rich maternal uncle, (that is, mother's brother), and also a rich cousin (paternal uncle's son): his maintenance shall be obligatory on the maternal uncle, because the maternal uncle is a relation who is unlawful (*Mohurrum*): and the maintenance of those who are unlawful, or *Maharim*, is obligatory on *Zee Ruhum-i-Mohurrum*, and not on those who would inherit.

1761. (861.) A poor man has a minor son who is poor, or an adult son who is a cripple and also poor, and that poor man has also three brothers of different sorts (that is, full brother, half-brother, and step brother) who are rich: the maintenance of the man shall be obligatory on the brother by the same father and mother only, and on the brother by the same mother only, according to sixths (that is, the full-brother shall be liable for five-sixths, and the brother by the same mother only, for one-sixth); regard being had to their right of inheritance.

But the maintenance of the son of the poor man, shall be obligatory particularly on the child's paternal uncle by the same father and mother (that is, on the father's full-brother), regard being had to the right of inheritance.

1762. (862.) And the principle in regard to this matter (*viz.*, where the person immediately liable to maintenance is poor, and consequently the liability to maintenance passes on to another relative) is this, that he who

is poor, in regard to the (liability to) maintenance shall be considered as non-existing (provided he inherits the whole of the property), and after that, the liability to maintenance passes upon one who shall be heir in proportion to the right of inheritance (*e.g.*, in the case in paragraph 861; the father is poor and has to be maintained; his son who would, if he were in good circumstances, be liable to maintain his father, is also poor: the father has three sorts of brothers, *viz.*, the brother by the same father and mother, the brother by the same father only, and the brother by the same mother only; the son would, in the event of his father's death, inherit the whole of his property; he shall, therefore, be supposed to be non-existent; then the father's heirs would be the brother by the same father and mother, and the brother by the same mother only, in the proportion of five to one; and they shall, therefore, be liable to maintenance in the same proportion. So also if the son were the person to be maintained; then, if his father is poor, he would be supposed to be non-existent; because the father takes the whole of the property of the son: and the other relatives of the son are the father's full brother, the father's half-brother, and the father's step-brother, and amongst these the son's heir is his paternal uncle, who would be bound to maintain him).

And if in the place of the son (in the second clause of paragraph 861) there is a daughter (that is to say, if there is a poor father, and he has a daughter who is also poor, and he has three sorts of brothers) then the maintenance of the father as well as of the daughter shall be payable by the full-brother in particular (*i.e.*, only by the full-brother); the reason why the maintenance of the daughter shall be payable by the father's full-brother, is what we have stated, *viz.*, that the father shall be considered as non-existing (because he is poor) in the same way as we have considered the father non-existing in the case of the son (in the second clause in paragraph 861), and the liability consequently fell upon the full-paternal uncle (because he, of all the three sorts of paternal uncles, would be heir to the son: that is to say, the poor daughter has a poor father who would inherit the whole of her property, and he must, therefore, be considered as non-existent; there remain the father's three sorts of brothers who are her three sorts of paternal uncles, and in the event of her death, the full-paternal uncle would inherit, and he would, therefore, maintain her). And the reason why (in case the poor father has a poor daughter) the father's maintenance shall devolve upon his full-brother is because his heir in this case is his full-brother, because the full-brother inherits with the daughter, and other sorts of

brothers are not heirs (the brother by the same father only is excluded by the full-brother, and the brother by the same mother only is excluded by the daughter) and the daughter in this case shall not be considered as non-existing (because the principle stated above is to be taken, with this condition, *viz.*, that the person supposed to be non-existent is one who is to inherit the whole of the property); on the other hand, the inheritor with the daughter must be considered (*i.e.*, we shall have to find out who inherits as co-heir with the daughter), but the half-brother by the same mother only, does not inherit with the daughter (and, therefore, the heirs will be the daughter and full-brother, in moieties, the brother by the same father only, being excluded by the full-brother; but the daughter being poor, the whole of the maintenance shall fall on the full-brother; that is to say, the father being poor, requiring maintenance, his daughter is also poor and his three sorts of brothers are rich; then the daughter shall not inherit the whole of the father's property, and she shall, therefore, not be considered non-existent; the father's heirs will be the daughter and the father's full-brother in moieties, and they will be bound to maintain in moieties; but the daughter being poor, her liability will pass to her co-heir, *viz.*, the father's full-brother, who will be wholly bound to maintain the father): but the son, on the contrary, shall be considered as non-existent, because none of the brothers can inherit with the son, and, therefore, there arises a necessity to suppose the son as non-existent (otherwise, no one will be heir, and no one will be bound to maintain): and when we suppose the son as non-existent, then the inheritance from the father will go to the full-brother and the half-brother by the same mother only, in sixths (that is, the share of the latter will be one-sixth and that of the former five-sixths); and, therefore, their liability to maintenance shall be measured accordingly.

And if in the place of the three different sorts of brothers, there are three different sorts of sisters, and the child (who is poor and a cripple; see paragraph 861) is a male (that is to say, if the poor father has a poor son, and has three sorts of sisters who are rich) then the maintenance of the father shall be on the (three sorts of) sisters, in fifths; because none of the sisters inherits with the son, and the son, therefore, shall be supposed to be non-existent, and when we have supposed the son to be non-existent, then the inheritance of the father shall be divided between them (the three sorts of sisters) into five parts, and three-fifths shall be inherited by the full-sister, and one-fifth by the half-sister by the same father only, and one-fifth by the sister by the same mother only, by way of return: and the main-

tenance shall be due accordingly. And the maintenance of the son (in this case, the son being poor and a cripple) shall be payable by the (father's) full sister in particular (*i.e.*, only the full sister) according to our *Oolemas*, on whom be peace; because the inheritance from the son, in the absence of the father, goes specially to the paternal aunt by the same father and mother; and, therefore, the liability to maintenance shall be upon her.

1763. (863.) And the principle in this matter (*i.e.*, in the matter when the poor maintenance-giver is to be held non-existent, and when he shall not be held non-existent) is this, that when in regard to a person, who ought to be maintained (or in other words, whose right of maintenance is under discussion), there are relatives who are rich and poor, then the poor (or indigent) shall be looked at, and if the poor relative takes the whole of the inheritance (that is, if he should be entitled to the whole of the inheritance from the person whose right of maintenance is under discussion, assuming the latter to die at the time of the discussion) then he shall be considered as non-existent (because he takes the whole of the inheritance, and he is poor and is unable to maintain) and then the person who shall be heir to the person whose right of inheritance is under discussion, shall be looked at (that is to say, we shall have to find out who is the heir, now that we have assumed the immediate full-heir to be non-existent), and the liability to maintenance shall be on him to the extent of his right of inheritance. But if the poor relative does not take the whole of the inheritance (but takes only a portion of the inheritance, then he shall not be considered non-existent; on the other hand, he shall be considered as existing, and) the liability of maintenance shall devolve upon this poor heir and upon the heir who will take the inheritance along with him. Thus regard is had to the indigent relation for the purpose of ascertaining (in the first instance) the liability of maintenance which shall be cast on the rich relative, and then the whole of the maintenance shall be payable by those who are rich, in accordance with (that is to say, in proportion to) their original shares of liability to maintenance (ascertained according to their rights of inheritance; that is to say, the rich heirs pay maintenance on their own behalf for themselves, and the liability of the maintenance, which the poor relation had, is also thrown on the rich relation, in proportion to the inheritance of the rich in the estate; *e.g.*, if there are two poor relatives who take as 2 is to 1, and there are two rich relatives, who take as 6 to 3, then the additional liability of the rich is thrown upon them, on account of the poverty of their

co-heirs, shall also be in the proportion of 6 to 3; that is to say, 2 plus 1, shall be divided in the proportion of 6 to 3, and the rich relatives shall bear the liability to maintenance in this way).

And the illustration of this principle is in this wise: A minor has a full-sister, and a sister by the same mother only, and a sister by the same father only, and also a mother: (the mother will be entitled to a sixth, because she is associated with two or more sisters; the full-sister will be entitled to half; the sister by the same mother only will get one-sixth, and the sister by the same father only, will get one-sixth); but the mother and the full-sister are rich, and the rest (that is, the half-sister and the step-sister) are indigent; the maintenance of the minor shall be payable by the mother and full-sister in four shares (of which three shares shall be payable by the full-sister and one share by the mother) and there shall be no liability on the others. (Thus the indigent sisters are brought into consideration, for the purpose of ascertaining the liability of those who are rich, and after such liability has been ascertained, they are dropped out of consideration). And if those (sisters, *i.e.*, the half-sister and the step-sister) not liable to maintenance had been considered as non-existent from the beginning, then the liability to the maintenance of the minor, upon the mother and the full-sister, would have been in five shares (because the mother would, in the event of there being no other relatives besides herself and a full-sister, take one-third, that being her share with one sister; and the full-sister would take one-half, and the division would be by five, and there would be a return of one share); that is three-fifths on the full-sister and two-fifths on the mother, according to their right of inheritance.

1764. (864.) A minor has a rich mother and two brothers, likewise rich, that is, one full-brother, and one brother by the same father only: the maintenance of the minor shall be due from the mother and the full-brother, in sixths; that is, one-sixth from the mother and five-sixths from the full-brother, according to their right of inheritance; (but if there had been only a mother and a full-brother, then the mother's share would be one-third and the brother's share would be two-thirds in the inheritance, and their liability to maintenance would be measured accordingly).

1765. (865.) A man dies leaving a minor child and his father: the maintenance of the child shall be obligatory on the child's grandfather: and if the minor has a mother who is rich and a grandfather (*i.e.*, father's father) who is rich, the maintenance of the minor shall be obligatory on the

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father's father and the mother, in thirds (that is, one-third on the mother, and two-thirds on the father's father) according to the Zahir-i-Ruwayet, regard being had to their right of inheritance (see note to paragraph 851, for the general rule to which this case is an exception). And according to the tradition reported by Hussun (son of Zyad), on whom be peace, from Aboo Haneefa, on whom be peace, the maintenance of the minor is obligatory on the father's father (alone, and no portion of the obligation shall be on the mother), in the same way as if, in the place of the father's father, there was the father (that is, if there are father and mother, then the father is liable and not the mother; so, if there are father's father and the mother, then the former is liable and not the latter).

And if the mother is indigent, then in the case (that is, when the minor's mother is poor and the minor's father's father is rich) the maintenance of the minor is obligatory on the father's father, and the mother shall be considered as non-existent (that is to say, she not inheriting the whole of the estate shall be considered as living, for the purpose of ascertaining who else would take the inheritance; that point having been ascertained, she shall be considered as non-existent for the purpose of fixing the liability to maintenance, and the whole of the liability to maintenance is thrown on her co-heir).

1766. (866.) And if the mother (of the minor) is rich, and the minor (whose father is dead) has a full brother who is rich, and a father's father who is rich, then (although, according to the general rule stated in the note to paragraph 851, the mother would be liable to maintenance, but still she is not so liable, and this case is an exception to the general rule there stated, the rule here being that) Aboo Haneefa, on whom be peace, says —and this is the view taken by (the first Khaleefa) Aboo Bakr Siddeek, on whom be peace—that the maintenance of the minor is obligatory on the father's father.

1767. (867.) An indigent woman has a minor son who is poor; she has three sisters of different kinds (who are rich): the maintenance of the minor son shall be obligatory on his aunt by the same father and mother, because the mother would take the whole of the inheritance (of the son), and she shall therefore be deemed non-existent: and in the event of there being no mother, the maintenance of the minor shall be obligatory on the aunt by the same father and mother, regard being had to the right of inheritance (*i.e.*, according to the right of inheritance, the full aunt excludes

the others). But the maintenance of the mother shall be obligatory on her three sisters, in fifths, that is, three-fifths on the full sister, and one-fifth on the sister by the same father only, and one-fifth on the sister by the same mother only.

1768. (868.) A poor woman has a rich child, and poor (or rich) parents: her maintenance shall be obligatory on the child and not on the parents; (the general rule being, that) nobody else shares with the child the liability to maintain the parents, in the same way as nobody else shares with the father the liability to maintain his child, according to Zahir-i-Ruwayet (*i.e.*, according to the Zahir-i-Ruwayet, the child alone shall maintain his parents, and the father alone shall maintain his child).

1769. (869.) And so, if an idiot has a son and a father: the maintenance of the idiot shall be obligatory on the son and not on the father.

1770. (870.) A woman has two sons, both rich, and they are ordered by the Kazee to maintain their mother, and one of them refuses to maintain: the other son shall be ordered by the Kazee to provide the whole of the maintenance, and he shall afterwards realise a moiety from his brother.

1771. (871.) A poor woman has three daughters of three different sorts of brothers, or she has three daughters of three different sorts of sisters, (that is to say, she has three nieces being daughters of three different sorts of brothers or three different sorts of sisters). Aboo Yusoof, on whom be peace, says, that the whole of the maintenance shall be obligatory on that daughter who is the offspring (of the brother or the sister by, or) of the same father and mother (that is, who is the offspring of full blood, as regards the woman; because that daughter alone would be the heir): and Mahomed, on whom be peace, says, as regards the sisters' daughters, that one-fifth of the maintenance shall be obligatory on the daughter of the sister by the same mother only, and one-fifth on the daughter of the sister by the same father only, and three-fifths shall be obligatory on the daughter of the full sister (because they would be heirs in this proportion, according to Aboo Yusoof); and as regards the brothers' daughters, he says, that one-sixth of the maintenance shall be obligatory on the daughter of the brother by the same mother only, and the rest (that is, five-sixths) shall be obligatory on the daughter of the brother by the same father and mother; and there shall be no obligation on the third (that is, the daughter of the brother by the same father only). God knows best!

Section VII.

ON THE MAINTENANCE OF THE SLAVES (MUMLOOK).

1772. (872.) A slave (of the *Kin* class), or a *Moodubbur*, marries a woman with the permission of his master: the husband shall be liable to maintain his wife, and if he gets children by her, he shall not be liable to the maintenance of the children, whether the woman be a free woman or a slave-girl; because if the woman is free, then her children are also free, and, therefore, her husband (who is a slave or Moodubbur) shall not be liable to maintain the children who are free (and their maintenance shall be governed by other rules: see paragraphs 862 and 863); and if the woman is a slave-girl, then her children are also the slaves of the person who is the master of their mother, and, therefore, their maintenance shall be obligatory on the mother's master.

1773. (873.) And so a *Mookatub*, if he marries a woman, is no liable to the maintenance of his child; except when he has a child who was born to him whilst he was a *Mookatub*, in consequence of his connexion with the woman purchased by him as a slave-girl, whilst he was a *Mookatub*, and such a child shall be maintained by the *Mookatub*.

And so, if a *Mookatub* marries a slave-girl (belonging to another) who gives birth or does not give birth to a child by him, and the *Mookatub* purchases her, and she then gives birth to a child: this child's maintenance shall be obligatory on the *Mookatub*.

1774. (874.) If a male *Mookatub* marries a female *Mookatuba*, an the person who made them *Mookatub*, or, in other words, their master, is on and the same, and they produce a child during their state as *Mookatub*: th maintenance of the child shall be on the mother; because the child follow the status of the mother, and is, as it were, owned by its mother, and, therefore, the maintenance of the child shall be obligatory on the mother.

1775. (875.) And so if a free man marries a female slave, or a femal *Mookatuba*, or a female *Oomm-i-Wulud*, or a female *Moodubbura* (all belonging to somebody else), he shall be liable to the maintenance of the woman except that, in the case of a female slave, or a female *Moodubbura*, or a female *Oomm-i-Wulud*, the husband is not liable to maintain her as long as the master has not assigned her a separate residence, and in the case of a female *Mookatuba*, her maintenance is obligatory on her husband, and in her case, assignment of a separate residence is not a condition for the husband's liability to maintenance; and the husband is not liable to the maintenance

of their children. And the maintenance of such children is only obligatory on the mother's master, when the mother is a female slave, or a *Moodubbura*, or an *Oomm-i-Wulud*.

1776. (876.) And if the master of a female slave or a female *Moodubbura*, or a female *Oomm-i-Wulud*, is indigent, and her husband, that is, the father of the children, is rich, the question is, whether it is obligatory on the father to maintain the children. In case the child is born of the female slave, the maintenance of the child is not obligatory on the husband; because the child of the female slave is owned by the master of the female slave, and the master is, therefore, bound to maintain the child, or sell the child, as he would sell the female slave, if he is unable to support her; but if the child is born of a female *Moodubbura*, or a female *Oomm-i-Wulud*, and if the mother's master is indigent, sale (of the child by the master) is impossible in this case; and in this case, the father shall be ordered (by the Kazee) to maintain the child, and then to recover from the master (of the mother).

1777. (877.) A man gives his female slave in marriage to his male slave, whether he assigns to her a separate residence or not, the maintenance of the female slave and of the male slave shall be obligatory on their master; and if he refuses to maintain them, he shall be ordered by the Kazee to sell them.

1778. (878.) A man gives his daughter in marriage to his male slave, and the daughter demands maintenance (from her husband, the slave): her maintenance shall be fixed (by the Kazee) on her husband.

1779. (879.) A man marries a female slave, and her master does not assign her a separate residence; so that the husband gives her a reversible divorce: the master is entitled to order the husband to take a house for her and maintain her during the *Iddut*: and if the divorce is complete (*bain*), it is not competent to the master to provide for a retirement for her and her husband (by asking the husband to take a house for her to pass her *Iddut* in). And is the master competent to demand from the husband her maintenance during the period of her *Iddut?* Khussaf, on whom be peace, says, it is competent to the master to call upon the husband to provide her with maintenance (for the period of her *Iddut*): and other learned lawyers have said that it is not competent to the master to demand her maintenance from her husband: and this is the correct view; because the woman was not entitled to maintenance from the husband before the complete (*bain*) divorce, in consequence of want of a separate

residence, and, therefore, she shall not be entitled to maintenance from him after the complete (*bain*) divorce.

1780. (880.) And if the divorce is reversible (in the case mentioned in the preceding paragraph), and the female slave then, after the divorce, becomes free, it is competent to the woman to demand from her husband a separate residence, and to provide her with maintenance until the expiry of her *Iddut*: but if the divorce (pronounced before freedom) is complete (*bain*), it is not competent to her to call upon him to provide her with residence, because, before divorce, the husband was not bound to provide her with residence, in consequence of her master having failed to provide her with a separate residence, and so, he is not bound to provide her with residence after divorce.

And this supports the view of those lawyers who are referred to in the first case, as "other learned lawyers."

1781. (881.) A man finds a runaway slave, and captures him, with a view to restore him to his master, and maintains him: then, if he maintains the slave without an order of the Kazee, he shall have merely done an act of kindness, and shall not be entitled to recover from the master: and if he refers the matter to the Kazee, and asks for an order from the Kazee, that he should maintain the slave, then the Kazee shall deliberate over the matter, and if he finds that it is proper to order the maintenance, he shall order him to provide the slave with maintenance; but if the Kazee apprehends that the maintenance will swallow up the slave (that is, exceed his value, or be equal to it) then he shall order him to sell the slave, and retain the price.

And so also, if a man finds an animal that has gone astray in a town, or in a place other than a town.

1782. (882.) And if a man usurps a slave, he shall be liable to maintain the slave until he returns him to his master: and if the man asks the Kazee for an order (to enable him) to maintain the slave, or to sell him, the Kazee shall return no answer; because property usurped is a thing for which the usurper is liable to pay damages; unless the usurper is a man as to whom fear is entertained in regard to the slave (*i.e.*, that the man will remove or make away with the slave), in which case the Kazee shall take the slave from the man, and shall sell him and retain the purchase money.

1783. (883.) And if a man entrusts (*wudeeut*) his slave to another person (*e.g.*, for safe keeping) and then disappears, and the trustee goes to the Kazee and asks for an order for him to maintain the slave or to sell

him: the Kazee shall order him to let out the slave on hire, and maintain him with his wages; and if the Kazee thinks proper that the slave should be sold, he shall direct accordingly.

1784. (884.) A man makes a will giving his slave to one person, and the slave's services to another: the maintenance of the slave shall be obligatory on the person enjoying his services: and if the slave falls sick in the hands of the person enjoying his services, then, if the disease is such that the slave is not prevented from serving, his maintenance shall be on the person entitled to his services: and if the disease is such that the slave is prevented from service, then his maintenance shall be obligatory on the owner of the slave: and if the disease is prolonged and the Kazee thinks it proper to sell the slave, then the Kazee shall sell him, and shall purchase with the sale-money another slave, who shall be in the place of the first slave in regard to services (and also in regard to ownership).

1785. (885.) And a slave who has been pledged, when the pledge is proved, shall be acted on (and dealt with) in the same away as a slave is to be acted on (and dealt with) when entrusted to another (that is to say, the rule laid down in paragraph 883 shall apply).

1786. (886.) A slave is common to two men, and one of them disappears, leaving the slave to his partner, and the partner refers the matter (of the slave's maintenance) to the Kazee, and establishes proof by witnesses in regard to his claim (relating to the partnership of the slave, and the partner's disappearance) the Kazee shall have the option either to accept such proof (given in the absence of the co-sharer) if he likes, or not to accept the same; and if the Kazee accepts the proof (which is tendered to prove that the slave belonged to both, and that one partner has disappeared), he shall order the claimant to provide for the slave's maintenance, and the rule in this case shall be the same as that in the case of trust (that is, to let out the slave on hire, and to maintain him with the wages, or to sell him: see paragraph 883).

1787. (887.) A male slave, being a minor, or a cripple, or an idiot, is emancipated by his master: his maintenance shall not be obligatory on the emancipator in any case (whether the slave be a minor or a cripple, or an idiot). God knows best; and he is the best Judge over all the judges!

Here ends Volume I. of the "Futwai Kazee Khan," from which only a portion has been translated, the portion omitted being on matters not relating to the subject of these Lectures.